**CHENG HANG GUAN & 2 ORS.**

**v.**

**PERUMAHAN FARLIM (PENANG) SDN. BHD. & 3 ORS.**

HIGH COURT, PENANG
TAN SRI DATUK EDGAR JOSEPH JR.. SCJ
[CIVIL SUIT NO. 311 OF 1982]
20 MARCH 1993

***CONTRACT: Agency - Doctrine of 'holding out' - Ostensible or apparent authority - Onus rests on person dealing with agent - Conduct must be proved affirmatively; Damages - Exemplary damages - Categories and principles - Compensatory award - Reflect gravity of wrongdoing - Method of proving market value; Promissory estoppel - Promises and assurances to the plaintiffs - Plaintiffs' claim to alleged equity does not depend on the availability of the remedy of specific performance; Proprietary estoppel - Principles - Where a person builds or improves land of another - Akin to constructive trusts; Conditions on receipts - Onus of proving conditions of receipts had contractual force.***

***EVIDENCE: Admission by non-party - Section 18(3) of Evidence Act 1950; Burden of proof - Onus of proving conditions on receipts had contractual force; Hearsay - Evidence of promises or assurances - Admissible when proposed to establish by the evidence, not the truth of the statement but the fact that it was made.***

***LAND LAW: Estoppel - Promises and assurances to the plaintiffs - Substantial expenditure based on the promises and assurances; Proprietary estoppel - Principles.***

***LANDLORD AND TENANT: Notice to quit - Factors determining sufficiency - Reasonable period for notice.***

***PRACTICE AND PROCEDURE: Amendment of pleadings - Time limit to file - Order 20 r. 9 RHC 1980 - Whether new cause of action was introduced by amendment to join the defendants after issue of writ; Locus standi - Effect of non-joinder of party - Order 15 r. 6(1) of RHC 1980.***

***TORT: Trespass to land - Mistake is no defence - Damages.***

The plaintiffs (P1, P2 and P3) claimed that they were and are lawful and protected tenants and were entitled in law and equity to possession of portion of holding Nos. 3532 and 2497, Mukim 13, NED, Penang ("the plot concerned") on which were situated their two dwelling houses Nos. 258K and 259H ("the two dwelling houses") and their vegetable farm ("the farm"). The registered proprietors of holding No. 3532 ("Thean Teik Estate") were and are the trustees of Khoo Kongsi. The family of one Cheong, P2's grandfather, had converted what was once a swampy jungle land into a productive farm. Upon Cheong's death, P2 took charge of the farm. The family members worked the farm. The house No. 258K has been standing on the plot concerned before 1938 and house No. 259H was built by Cheong in 1963 with the consent of Khoo Kongsi and registered in the name of P2. In 1972, P1 and P2 were registered as tenants of House No. 258K while after Cheong's death, P2 spent RM1,500 in providing a ceiling for House No. 259H. Separate rent receipts were issued in respect of the two dwelling houses, but no conditions were printed on the rent receipts issued to Cheong and P2 until late 1981. Sometime in 1972, the visiting trustee of Khoo Kongsi had told P2 that it was not necessary to change the tenancy of the vegetable plot to her name and that she could continue planting vegetables as long as she wished provided she paid rent. Cheong had also told PW2 that an assurance was given by Khoo Kongsi that as long as he continued to pay ground rent he could stay and cultivate the vegetable plot as long as he wanted. Upon the death of a tenant of a vegetable plot, his tenancy continued for the benefit of his family and so long as his family members continued to pay the rent, they could continue farming. After the assurance given by the visiting trustee, the plaintiffs invested RM12,000 in installing a sprinkler system. The assurance given to P2 is consistent with the practice of Khoo Kongsi before the developers Farlim came on to the scene in the late seventies. For more than 50 years, neither Khoo Kongsi or anyone else had interfered with the farming activities of the plaintiffs' family. Only after Khoo Kongsi had entered into a joint-venture agreement was there any interference with the plaintiffs' possession of the plot concerned.

The plaintiffs' claim against the defendants was founded on trespass and nuisance allegedly committed by the defendants and by their servants or agents. The reliefs prayed for by the plaintiffs are aggravated and exemplary damages for trespass and nuisance with interest thereon, a permanent injunction restraining the defendants by themselves or their servants and/or agents or otherwise howsoever from

entering, trespassing and/or carrying out works on the plot concerned on which are situated the dwelling houses and the farm, and costs.

The defendants advanced various objections based upon points of law and procedure, that

(i) The plaintiffs attempted to introduce a new cause of action *via* the joinder of D3 and D4 after the issue of the writ;
(ii) The re-amendment of the statement of claim by the plaintiffs to raise a claim for trespass against D3 and D4 ought not to have been allowed;
(iii) The requirements of O. 20 r. 9 of the Rules of the High Court 1980 ("RHC") with regard to the implementation of the order granting leave to amend had not been complied within the 14 day period stipulated therein;
(iv) The suit was bad for non-joinder and that the plaintiffs have no title to the plot concerned and thus no *locus standi*;
(v) The remedy of self-help would be available to D1 and D2 if the plaintiffs are held to be trespassers in law,
(vi) The pleas of *res judicata* and issue estoppel will bar the plaintiffs' claim.

As to the issues embarking upon the consideration of merit, the following were raised:

(i) What was the area of the plot concerned of which the plaintiffs had possession and whether the plaintiffs were both in law and in equity entitled to such possession of the plot concerned, the dwelling houses and the farm;
(ii) What notice to quit was necessary to determine the plaintiffs' tenancies of the farm and the two dwelling houses assuming such tenancies were not coupled with equity;
(iii) Whether the service of the notice to quit was effective in law;
(iv) Whether the dwelling house No. 258K was subject to the Control of Rent Act 1966;
(v) Whether the plaintiffs were protected in their occupation of the plot concerned by equity or equitable estoppel;
(vi) Does the availability of the alleged equity depend on the availability of the remedy of specific performance;
(vii) Whether the plaintiffs' tenancies are binding on D1 and/or D3;
(viii) Whether the plaintiffs are entitled to rely upon the plea of proprietary estoppel, and the extent of the plaintiffs' equity;
(ix) Whether the defendants committed trespass and nuisance; and
(x) The appropriate sum to award by way of damages.

**Held:**

**[1]** It is obvious from the evidence before the Court that the cause of action against the D3 and D4 arose from wrongful acts committed by them before they were joined as defendants and as such the plaintiffs were not introducing a fresh cause of action against D1 and D2. It would be neither right nor fair to entertain the objection made by the defendants' Counsel at a very late stage of the application for joinder of D3 and D4.

**[2] (a)** Leave to amend was properly given based on the sequence of events with regard to the application for re-amending the statement of claim to include D3 and D4, coupled with the fact that there was no objection by the defendants' solicitors.

**(b)** The re-amended statement of claim was filed in the registry of the Court well within the time limited for doing so and the plaintiffs could not have done anything more. Order 20 r. 9 of the RHC was not breached.

**[3] (a)** The term *locus standi* or standing in a Court of law means entitlement to judicial relief apart from questions of the substantive merits and legal capacity of a plaintiff. The Court is bound to proceed on the basis that everything alleged in the statement of claim and in the documents relied upon by the plaintiffs is true and that the jurisdiction to uphold a plea of no *locus standi* should only be exercised very carefully in circumstances where there is no possibility of doubt.

**(b)** The objection as to the non-joinder was only taken at a very late stage and O. 15 r. 6(1) of the RHC provides that no cause or matter shall be defeated by reason of non-joinder of any party.

**[4] (a)** There was *locus standi* as it could be reasonably inferred from the evidence that P2 was in the position of a constructive trustee of the farm for the benefit of herself, the other plaintiffs and PW1. Consequently, P2 alone could

maintain the suit to protect trust property.

**(b)** The Statute of Frauds has no application to the gift of the vegetable plot to the plaintiffs and PW1 which had been perfected while Cheong was still alive. This is not an action based on any contract for the sale, or other disposition of land, or any interest in land.

**[5]** Only if the plaintiffs are held by the Court to be trespassers in law then the remedy of self-help would be available to D1 and D3.

**[6]** The legal effect of the refusal of the interlocutory injunction was simply that, at the interlocutory stage, based on the limited material then available, the plaintiffs were not entitled to the injunctive relief claim, and the dissolution of the injunction does not mean that the plaintiffs had no interest in the portion of the plot concerned.

**[7]** A receipt is in law only evidence of the payment of a sum of money and does not constitute a contract nor can it have the effect of an estoppel. The true intention of the parties must be established by evidence at the trial. Here there is no evidence that the conditions appearing in the rent receipts whether in respect of vegetable lands or the dwelling houses had been introduced from the inception of the tenancies nor is there anything to show that the plaintiffs or their ancestors who had no knowledge of the English language could be said to have accepted the "conditions". The *onus* of proving that the conditions on the receipts had contractual force was upon the defendants who were relying upon that condition and not upon the plaintiffs to prove the converse. No adverse inference may be drawn against the plaintiffs for this omission even assuming such old receipts were available. The mere fact that the plaintiffs had themselves used the receipts bearing the conditions aforesaid as evidence does not in any way debar them from contending at the final hearing that those conditions were invalid in law. The conditions appearing in the rent receipts is devoid of legal effect and must be disregarded in considering the question of the sufficiency or otherwise of the notice to quit.

**[8] (a)** The mode of payment of rent is not necessarily a decisive factor although it is an important factor in determining the question of the sufficiency of the period of a notice to quit. Whereas here, there was no written tenancy agreement to construe the nature of the tenancies and what notice to quit was necessary to determine these tenancies, the Court had to take into account not just the mode of payment of the rent but also the conduct and intention of the parties, the contemplated user of the subject matter of the tenancies and other relevant circumstances of the case as a whole. The Court has a discretion which has to be exercised judicially and this calls for a balancing exercise. The Court considered three months notice would be reasonable for the determination of the tenancies of the farm and the two houses as this would afford the plaintiffs sufficient time within which to harvest their crops and to yield vacant possession of the plot concerned.

**(b)** Notices to quit are validly served if left at the premises and when the notice to quit was received by the occupants it was received as agents for and on behalf of the Official Administrator.

**[9]** The Court has no jurisdiction to make an order for possession in respect of dwelling house No. 258K because the defendants did not attempt to satisfy the requirement of s. 16(1) of the Control of Rent Act 1966.

**[10] (a)** The Court is satisfied that promises or assurances had been made by Khoo Kongsi to Cheong that so long as he continued to pay ground rent he could stay and cultivate the vegetable land as long as he wanted and relying on the same he and his family had converted what was once a swampy jungle land into a productive farm. He also built dwelling house No.258K and No. 259H on the vegetable land with the consent of Khoo Kongsi and had it registered in the records of Khoo Kongsi in the name of P2. Cheong would hardly have done these acts which involved unusual exertion and considerable expense unless those promises and assurance had in fact been made. The plaintiffs have also incurred substantial expenditure based on the promises and assurances. The tenancies held by Cheong were not

just for his benefit but also for the benefit of his family and these tenancies could not have been mere monthly tenancies. The trustees of Khoo Kongsi must have been fully aware that Cheong was the head of an extended Chinese family and the farming activities carried on were for the benefit of this extended family.

**(b)** It is well established that the evidence of the promises and assurance made to Cheong and P2 by the visiting trustee is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement but the fact that it was made. The same is frequently relevant in considering the mental state and conduct thereafter of the witness.

**(c)** By virtue of s. 18(3) of the Evidence Act 1950 statements made by a non-party to the suit are admissible.

**(d)** The doctrine of "holding out" sometimes called apparent or ostensible authority, has been said to have been based upon estoppel. Agency by estoppel arises where one person has so acted by allowing the agent to hold himself out as having authority as to lead another to believe that he has authorised a third person to act on his behalf, and that other, in such belief, enters into transactions with the third persons within the scope of his ostensible authority. The *onus* rests on the person dealing with the agent to establish real or ostensible authority. The conduct said to amount to holding out must be proved affirmatively. It is a question of fact in a particular case whether ostensible authority existed for the particular act in respect of which liability is sought to be imposed upon the principal. On the evidence, the plaintiffs have succeeded in proving on the balance of probabilities that the visiting trustee was held out as having power to deal with the tenants on its behalf, including the power to make the promises and assurances aforesaid upon which the plaintiffs had relied and incurred substantial expenditure by installation of a sprinkler system.

**[11]** The doctrine of promissory estoppel provides a defence to an action on the original contract for a defendant relying on a voluntary variation. It does not provide a cause of action for a plaintiff relying on a gratuitous promise. Yet, its effect may be to enable a party to enforce a cause of action which, without the estoppel, would not exist. Here the plaintiffs and their forbears have been in possession of the plot concerned for decades and they have commenced these proceedings to protect their rights to remain in possession relying on equity or equitable estoppel. In the circumstances, the plaintiffs' claim to the alleged equity does not depend on the availability of the remedy of specific performance.

**[12]** D3 became the registered lessee of Lot 2532 pursuant to clause 16 of the joint-venture agreement and D3's lease is held in trust for the benefit of Khoo Kongsi and D3 for the purpose of facilitating developments of the project. D3 is for purposes of development, the alter ego of Khoo Kongsi. Accordingly D3 would be in no better position to resist the plaintiffs claim to be entitled to be in possession in law and equity than would Khoo Kongsi itself. As successors in title with notice of the plaintiffs' interest in the plot concerned, D3 would have to take its lease subject to that interest. The validity of contract relating to land or any interest therein is explicitly declared in s. 206(3) of the National Land Code 1965 ("NLC"). Therefore the Court was unable to accede to the submissions of the defendants' Counsel that the protection of indefeasibility guaranteed under s. 304(1) of the NLC enables D3 to take its lease free of the plaintiffs' interest in the plot concerned.

**[13] (a)** Proprietary estoppel is one of the exceptions to the general rule that a person who spends money on improving the property of another has no right to claim reimbursement or any proprietary interest in property. Unlike promissory estoppel, proprietary estoppel when it operates is permanent in its effect and it is also capable of operating positively so as to give a cause of action. The Court cannot agree with the defendants' Counsel's submission that to establish proprietary estoppel, in cases where a person builds on or improves

land of another, the landowner standing by without asserting his rights, while this is going on, it is essential to prove that such a person mistakenly thought that the land was his own when he did those acts, though the Court accepted that in such a case, equity will treat the true owner's conduct as estopping him from subsequently asserting his title to the detriment of such person. This is so because even if such a person builds or improves land of another knowing he was doing so on land belonging to another, there will still arise an equity in him if the landowner led such person to expect to be allowed to stay there. It is not essential that the representator must have knowledge that his property is being improved. The representator's conduct and the subsequent action and the belief of the representee may render it unconscionable for the representator to insist on his strict legal rights.

**(b)** The principles which apply to constructive trusts are closely akin to those underlying the doctrine of proprietary estoppel. In both, the claimant must have acted to his detriment in reliance of the belief that he would obtain an interest and that equity acts on the conscience of the legal owner to prevent him from defeating the common intention. In cases such as this one, proprietary estoppel is a form of constructive trust.

**[14]** A person should be protected against interference for as long as he would be prejudiced thereby if he made the expenditure or the improvement on another's land. Having regard to the fact that the plaintiffs and their ancestors have been living on the plot concerned and cultivating the farm and the substantial sums of money which must have accrued to them and their ancestors by way of profit thereby over a period of several decades, and the further fact that the plaintiffs have enjoyed rent-free occupation for the last decade or so, the Court considered that the plaintiffs have had 'sufficient satisfaction' for their labour and expenditure on the plot concerned or the prejudice suffered by them has been fully satisfied and so they are entitled to no relief.

**[15]** The Court is satisfied that on the photographic evidence, the plaintiffs have proved on the balance of probability that,

(i) at all material times, the plaintiffs were and are in lawful possession of the plot concerned including the farm, the dwelling houses and the structures erected thereon;
(ii) The defendants had by their servants or agents committed acts of trespass and nuisance on the plaintiffs land.

**[16] (a)** The general rule as to the measure of damages is that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation. When a plaintiff claims damages from a defendant he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong and also that the damages are not too remote to be recoverable. And the plaintiff must prove their damage. Where precise evidence is obtainable the Court naturally expects to have it, where it is not, the Court must do the best it can. General difficulty of proof does not dispense with the necessity for proof.

(b) The normal way or method of proving market value in the case of a resale of goods in bulk would be to call the customers or at the least, where the parties agree to documentary evidence to tender documents showing the existence of and a dealing with customers. The plaintiffs here did none of these things nor did they produce any income tax returns. A plaintiff's unsupported assertion that he would receive such and such a price for his fruits or vegetables does not prove market value much less that he had a market. To accept the sufficiency of the above will dispense with proof of quantum altogether.

**[17]** Three categories of cases where exemplary damages could be awarded are,

(i) oppressive action by officers of the Crown;
(ii) cases where 'a defendant with a cynical disregard for a plaintiff's rights has

calculated that the money to be made out of his wrongdoing will probably exceed the damage at risk'; and

(iii) where statute expressly authorised it.

In addition, there are three 'considerations' applicable to all cases of exemplary damages, i.e.

(i) the plaintiff cannot recover such damages unless he is himself the victim of such 'punishable behaviour';

(ii) it can be used both for and against liberty; and

(iii) the financial means of the parties, though irrelevant to compensatory damages are relevant to exemplary damages.

**[18]** Trespass is normally associated with intentional acts even though committed by mistake, for mistake is no defence. And having regard to the particular circumstances of this case, mistake is no answer to the claims for exemplary damages.

**[19]** Awards of exemplary damages should be moderate and the resources of the parties was a relevant consideration. The quantum of the compensatory award as well as the conduct of the parties right down to the time of the judgment is the other factor which must be taken into consideration. Any sum which the Court awards by way of exemplary damages for these acts of trespass must reflect the gravity of the wrongdoing.

*[Plaintiffs' claims allowed with costs].*

**Cases referred to:**

*Chuan Chow Maritime SA Panama v. KSAS Bulk Sea Transport The Times, 25 February 1984* ***(refd)***

*Cheng Hang Guan & Ors. v. Perumahan Farlim (Penang) Sdn. Bhd. & Ors. [1988] 2 CLJ 35 / [1988] 3 MLJ 90* ***(refd)***

*Drane v. Evangelou & Ors. [1978] 2 All ER 437; [1978] 1 WLR 499* ***(refd)***

*Hayes v. Bristol Plant Hire Ltd. & Ors. [1957] 1 All ER 685; [1957] 1 WLR 499* ***(foll)***

*Performing Right Society Ltd. v. London Theatre of Varieties Ltd. [1924] AC 1* ***(refd)***

*Walter & Sullivan Ltd. v. J Murphy & Sons Ltd. [1955] 1 All ER 843; [1955] 2 QB 584; [1955] 2 WLR 919* ***(refd)***

*Kok Ek Chooi v. Cheah Soon Neoh & Anor. [1981] CLJ 179 / [1982] 1 MLJ 219* ***(refd)***

*V.M. Peer Mohamed v. Great Eastern Life Assurance Co. Ltd. [1982] 2 MLJ 298* ***(refd)***

*Strong v. Bird [1874] LR 18 Eq 315* ***(refd)***

*Leong San Tong Khoo Kongsi (Penang) Registered & Ors. v. Poh Swee Siang [1987] 2 MLJ 611* ***(foll)***

*Cheng Hang Guan & Ors. v. Perumahan Farlim (Pg) Sdn. Bhd. & Anor. [1983] 2 CLJ 84 / [1983] 1 MLJ 348* ***(refd)***

*Government of Malaysia v. Dato Chong Kok Lim [1973] 2 MLJ 74* ***(dist)***

*Mohd Ismail v. Lim Sok Cheng [1988] 1 CLJ 335* ***(refd)***

*Lee v. Lancashire Yorkshire Railway Co. [1871] LR 6 Ch App 534* ***(foll)***

*Hockle v. London County Council [1910] 26 TLR 580* ***(foll)***

*Oliver v. Nautilus Steam Shipping Co. Ltd. [1903] 2 KB 639* ***(foll)***

*Loke Yung Hong v. Shanghai Furniture Co. & Anor. [1948] MLJ 136* ***(refd)***

*Balwant Singh v. Tong Lam & Co. [1963] MLJ 33* ***(foll)***

*Lee Ah Low v. Cheong Lep Keen [1970] 1 MLJ 7* ***(dist)***

*Syed Mohd Alsagoff v. Max Behr [1883] 1 Kyshe 637* ***(refd)***

*Tay Boon Huat v. Kulsam Bee [1914] SSLR 51* ***(refd)***

*ALMM Muthukaruppan Chettiar v. Haji Ibrahim [1941] MLJ 150* ***(refd)***

*Yong Tong Hong v. Siew Soon Wah & Ors. [1971] 2 MLJ 105* ***(refd)***

*Adler v. Blackman [1953] 1 QB 146; [1952] 2 TLR 809; [1952] 2 All ER 945* ***(foll)***

*Doe d Martin v. Watts [1789] 7 TR 83* ***(refd)***

*Lim Kien Mok v. BH Kevan [1963] MLJ 284* ***(foll)***

*Teck Seng & Co. v. William Eu Keng Yuet [1980] 2 MLJ 115* ***(refd)***

*Lai Seng Fook v. Tang Kong Low [1978] 1 MLJ 158* ***(refd)***

*Mok Deng Chee v. Yap See Hoi [1981] CLJ 124 / [1981] 2 MLJ 321* ***(not foll)***

*Muniandy & Anor v. Muhammad Abdul Kader & Ors. [1989] 2 CLJ 577 / [1989] 2 MLJ 416* ***(not foll)***

*Nair v. Chidambaram [1961] MLJ 264* ***(foll)***

*Subramaniam v. PP [1956] MLJ 220* ***(foll)***

*Rama Corpn. Ltd. v. Proved Tin and General Investments Ltd. [1952] 2 QB 147* ***(foll)***

*Freeman & Lockyer (a firm) v. Buckhurst Park Properties (Mangal) Ltd. [1964] 2 QB 480; [1964] 2 WLR 618; [1964] 1 All ER 630* ***(foll)***

*Re Henry Bentley & Co. and Yorkshire Breweries Ltd, ex p Harrison [1893] 69 LT 204* ***(foll)***

*Council of the Shire of Ashford v. Dependable Motors Pty Ltd. [1961] AC 336; [1960] 3 WLR 999; [1961] 1 All ER 96* ***(foll)***

*Pole v. Leask [1863] 33 LJ Ch 155* ***(foll)***

*Bailey & Whites Ltd v. House [1915] 31 TLR 583* ***(foll)***

*Brazier v. Camp [1894] 63 LJQB 257* ***(foll)***

*Crabb v. Arun District Council [1975] 3 All ER 865; [1976] Ch 179; [1975] 3 WLR 847* ***(foll)***

*Karuppan Chetty v. Suan Thian [1916] 1 FMSLR 300* ***(foll)***

*Prudential Assurance Co. Ltd. v. London Residuary Body & Ors. [1992] 3 WLR 279* ***(foll)***

*Zimbler v. Abrahms [1903] 1 KB 577* ***(refd)***

*Siew Soon Wah & Ors. v. Yong Tong Hong [1973] 1 MLJ 133; [1973] AC 836* ***(refd)***

*Central London Property Trust v. High Trees House Ltd. [1947] KB 130; [1956] 1 All ER 256; [1947] LJR 77; 175 LT 333; 62 TLR 557* ***(refd)***
*Evenden v. Guildford City Association Football Club Ltd. [1975] QB 917; [1975] 3 WLR 251; [1975] 3 All ER 269* ***(refd)***
*Combe v. Combe [1951] 2 KB 215; [1951] 1 All ER 767; [1951] 1 TLR 811* ***(foll)***
*Amalgamated Investment & Property Co. Ltd. v. Texas Commerce International Bank Ltd. [1982] QB 84* ***(refd)***
*Ajayi v. RT Briscoe (Nigeria) Ltd [1964] 1 WLR 1326; [1964] 3 All ER 556* ***(refd)***
*Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd. [1968] 2 QB 839; [1968] 3 WLR 225; [1968] 2 All ER 987* ***(refd)***
*Hughes v. Metropolitan Railway Co. [1877] 2 App. Cas 439, 448* ***(refd)***
*Errington v. Errington and Woods [1952] 1 KB 290; [1952] 1 All ER 149* ***(refd)***
*Ashburn Anstalt v. Arnold [1988] 2 All ER 147; [1988] Ch 1* ***(refd)***
*Lyus v. Prowsa Developments Ltd. [1982] 2 All ER 953; [1982] 1 WLR 1044* ***(refd)***
*Goh Hooi Yin v. Lim Teong Ghee & Ors [1990] 2 CLJ 203 / [1990] 3 MLJ 23* ***(refd)***
*Devi v. Francis [1969] 2 MLJ 169* ***(foll)***
*Ahmad Yar Khan v. Secretary of State for India in Council [1901] LR 28 Ind App 211* ***(foll)***
*Denny v. Jensen [1977] 1 NZLR 635* ***(foll)***
*Ramsden v. Dyson [1866] LR 1 HL 129* ***(refd)***
*Brinnard v. Ewens [1987] Ch 2 EGLR 67; [1987] 19 HLR 415; [1987] 284 EG 1052* ***(refd)***
*Inwards v. Baker [1965] 2 QB 29; [1965] 2 WLR 212; [1965] 1 All ER 446* ***(foll)***
*Tan Khien Toong & Ors. v. Hong Bee & Co. [1987] CLJ 17 / [1987] 1 MLJ 387* ***(refd)***
*Lee Lum Soh v. Low Ngah [1973] 1 MLJ 97* ***(refd)***
*Imperial Bank of Canada v. Mary Victoria / AIR [1936] PC 193* ***(refd)***
*Khew Ah Bah v. Hong Ah Mye [1971] 2 MLJ 88* ***(refd)***
*AG of Hong Kong v. Humphreys Estate (Queen's Gardens) Ltd. [1987] AC 114; [1987] 2 WLR 343; [1987] 2 All ER 387* ***(foll)***
*Haslemere Estates Ltd. v. Baker [1982] 1 WLR 1109; [1982] 3 All ER 525* ***(foll)***
*Dann v. Spurier [1802] 7 Ves 231* ***(foll)***
*Khew Ah Bah v. Hong Ah Mye [1971] 2 MLJ 86* ***(refd)***
*Taylor Fashions Ltd. v. Liverpool Victoria Trustees Co. [1981] ER 897; [1981] QB 133; [1981] 2 WLR 576* ***(foll)***
*Shaw v. Applegate [1977] 1 WLR 970; [1978] 1 All ER 123* ***(refd)***
*Grant v. Edwards [1986] Ch 638; [1986] 3 WLR 114; [1986] 2 All ER 426* ***(refd)***
*Gillies v. Keogh [1989] 21 NZLR 327* ***(refd)***
*Lloyds Bank Plc v. Rosset [1990] 2 WLR 867; [1991] 1 AC 107* ***(refd)***
*Maharaj v. Chand [1986] AC 898* ***(foll)***
*Re Basham (decd) [1986] 1 WLR 1498; [1987] 1 All ER 405* ***(foll)***
*Griffiths v. Williams [1977] 248 EG 947* ***(refd)***
*Jones (AE) v. Jones (FW) [1977] 1 WIR 438* ***(refd)***
*Dodsworth v. Dodsworth [1973] 228 EG 1115* ***(refd)***
*Plimmer v. Wellington Corporation [1884] 9 App Cas 699* ***(refd)***
*ER Ives Investment Ltd. v. High [1967] 2 QB 379; [1967] 2 WLR 789; [1967] 1 All ER 504* ***(refd)***
*Bank Negara Indonesia v. Philip Hoalim [1973] 2 MLJ 3* ***(refd)***
*Raffaele v. Raffaele [1962] WLR 238* ***(refd)***
*Neesom v. Clarkson [1845] 4 Hare 97* ***(refd)***
*AG v. Baliol College, Oxford [1774] 9 Mod 407* ***(foll)***
*Kalimuthu v. S. Kandiah [1976] 2 MLJ 217* ***(refd)***
*Ward v. Kirkland [1967] Ch 194; [1966] 1 WLR 601; [1966] 1 All ER 609* ***(dist)***
*Livingstone v. Rawyards Coal Co. [1880] 5 App Cas 25* ***(foll)***
*Munnelly v. Calco [1978] IR 387* ***(refd)***
*Bonham-Carter v. Hyde Park Hotel Ltd. [1984] 64 TLR 177* ***(foll)***
*Biggin & Co. v. Permanite [1951] 1 KB 422; [1950] 2 All ER 859* ***(foll)***
*Aerial Advertising Co. v. Batchelors Peas (Manchester) [1938] 2 All ER 788* ***(foll)***
*Ashcroft v. Curtin [1971] 1 WLR 1731; [1971] 3 All ER 1208* ***(foll)***
*Rookes v. Barnard [1964] AC 1129; [1964] 2 WLR 269; [1964] All ER 367* ***(foll)***
*Cassell & Co. Ltd. v. Broome [1972] 1 All ER 801; [1972] AC 1027; [1972] 2 WLR 645* ***(refd)***
*Basely v. Clarkson 83 ER 565* ***(refd)***
*Praed v. Graham [1889] 24 QBD 53* ***(refd)***

**Legislation referred to:**
Civil Law Act 1956, ss. 4(3), 11
Contracts Act 1950
Control of Rent Act 1966, s. 16(1)
Evidence Act 1950, ss. 17, 18(3)(a), (b), 90
Land Code
National Land Code, ss. 206(3), 221(3)(b), 340(1)
Rules of the High Court 1980, O. 15 r. 6(1), O. 20 r. 9, O. 42 r. 12
Statute of Frauds 1677

**Other sources referred to:**
**Equity after Fusion: Federal or Confederate**, Evershed MR [1948] 1 Journal of the Society of Public Teachers of Law 171, 176
**Equity Doctrines and Remedies,** Meagher, Gummow & Lehane, (3rd Edn.) [1992] @ p. 433 para 1728
**Evidence,** Cross' (6th Edn.) [1985] p. 517
**Odger's Principles of Pleading & Practice** (22nd Edn.) 162-163
**Law of Evidence**, Field (11th Edn.) [1990] vol. 2 p. 1245 29
**The Supreme Court Practice** 1991 Vol. 1 p. 363

*For the plaintiffs - Mohideen Abdul Kader (Meenakshi Raman with him); M/s. Meena, Thayalan & Partners*
*For the defendants - R.R. Sethu (Rajasingam with him); M/s. R.R. Sethu*

**JUDGMENT**

**Edgar Joseph Jr. SCJ:**

Broadly stated, in this suit the plaintiffs claimed that at all material times, they were and are lawful and protected tenants and that they are entitled in law and equity to possession of that portion of the land forming part of the holding No. 3532, Mukim 13, NED, Penang, Lot 2497, Mukim 13, NED, Penang, in area 121 ,619 sq. ft. (or 2. 8 acres) delineated in the plan P16 ("the plot concerned") on which are situated their two dwelling houses, bearing numbers 258 K and 259 H ("the two dwelling houses") and their vegetable farm ("the farm").

At all material times to this suit the registered proprietors of holding No. 3532 (popularly known as "Thean Teik Estate") were and are the trustees of Khoo Kongsi.

More particularly, the plaintiffs' claim against the defendants is founded on trespass and nuisance, allegedly committed by the first defendant Perumahan Farlim (Penang) Sdn. Bhd. and by their servants or agents the second defendant Sriwata Sdn.Bhd., as developers and contractors, respectively on 18 June 1982 on a portion of the plot concerned etched black on the plan P14, and by the third defendant Perumahan Farlim (Malaysia) Sdn. Bhd. and their servants or agents the fourth defendant Thean Tatt Construction Sdn. Bhd., as developers and contractors respectively, on 17 March 1988 on a portion of the plot concerned etched orange on the plan P14 and their unlawful occupation of the portion etched black in P14.

The reliefs prayed for by the plaintiffs are for aggravated and exemplary damages for trespass and nuisance, with interest thereon, a permanent injunction restraining all the defendants whether by themselves or their servants and/or agents or otherwise howsoever from entering, trespassing and/or carrying out works on the plot concerned on which are situated the dwelling houses and the vegetable farm and costs.

On the other hand, broadly stated, the defence has raised objections based on points of procedure relating to amendments of pleadings, the law as to *locus standi* and, so far as the merits are concerned, the defence denies the averments aforesaid by the plaintiffs and counterclaims for possession, damages and *mesne* profits.

*a* In this judgment, unless the context otherwise requires, I shall refer to the first , the second, and the third plaintiffs as "P1", "P2" and "P3", respectively , and to the first, the second, the third and the fourth defendants as "D1", "D2", "D3" and "D4", respectively.

*b* The essential facts said to underly the plaintiffs' case may be conveniently taken from the written submission of Counsel for the plaintiffs and are as follows:

1.11 The plaintiffs' family has been staying on the plot concerned since the time of P2's great-grandfather, which would be in the *c* later part of the 19th Century or early part of the 20th Century i.e. more than 100 years ago. P2's grandfather, Cheong Au Pit, was 84 years of age at the time of his death in 1969.

*d* 1.12 Cheong Au Pit's family, by their own efforts, had converted what was once a swampy jungle into a productive farm. They levelled the land and constructed drains to drain away the water. They had also built pig sties, chicken coops, wells and other structures.

*e* 1.13 Cheong Au Pit, who managed the farm during his lifetime, was the head of an extended Chinese family, consisting of his children, grandchildren, sons-in-law, daughters-in-law and his adopted daughter Cheng Lye Hiang (PW1). After Cheong Au Pit's death, P2 took over the role of *f* Cheong Au Pit and managed the farm.

The family members worked on the farm and the income was used to pay for their expenses and the balance was shared among the family members who worked *g* in the farm.

1.14 House No. 258-K, has been standing on the plot concerned since before the birth of P2 on 15th December 1938. In 1972, after Cheong Au Pit's death, P1 and P2 were registered as tenants of this house in *h* place of Cheong Au Pit.

House No. 259-H was built by Cheong Au Pit in 1963 with the consent of Khoo Kongsi and registered in the name of P2. After Cheong Au Pit's death, P2 spent RM1,500.00 in providing a ceiling for the *i* house.

1.15 Separate rent receipts were issued in respect of the two dwelling houses and the vegetable plot standing on the plot concerned. No conditions were printed on the rent receipts issued to Cheong Au Pit and P2 until late 1981.

There is no record of any decision by the Board of Trustees of Khoo Kongsi on the alleged conditions of the tenancy of the vegetable plot.

Conditions were endorsed on the receipts for vegetable lands only after 1976 because Khoo Kongsi had, by then, entered into a joint venture agreement to develop a portion of Thean Teik Estate but on the receipts issued to P2 the conditions were indorsed only in 1981.

1.16 Some time in 1972, the visiting trustee of Khoo Kongsi had told P2 that it was not necessary to change the tenancy of the vegetable plot to her name and that she could continue planting vegetables as long as she wished provided she paid the rent.

Cheong Au Pit had also told P2 that Khoo Kongsi had assured him that so long as he continued to pay ground rent he can stay and cultivate the vegetable plot for as long as he wanted.

Upon the death of a tenant of a vegetable plot, his tenancy continued for the benefit of his family. So long as his family members continued to pay the rent, they could continue farming.

1.17 After the assurance given by the visiting trustee, the plaintiffs invested RM12,000 in installing a sprinkler system.

1.18 P2's testimony regarding the assurance given to her by the visiting trustee in 1972 was corroborated by the testimony of a trustee of Khoo Kongsi, Khoo Kah Seng (DW3) who testified:

"**Q**. When a tenant of vegetable farm dies, what does Khoo Kongsi do ?
**A.** The tenancy still continues for the benefit of the family of the deceased.

***Q***. So long as they continue to pay rents, they can continue farming ?"
***A.*** Yes.

Thus the assurance given to P2 is consistent with the practice of Khoo Kongsi before the developers Farlim came on the scene in the late seventies. DW3's evidence also shows that the tenancy was for the benefit of the family and not just the person registered as tenant. The trustees of Khoo Kongsi must have been fully aware of the social, cultural context in which their legal relationship with Cheong Au Pit was based. They must have known that Cheong Au Pit was the head of an extended Chinese family and that farming activities were by and for the benefit of this extended family.

1.19 For more than 50 years, neither Khoo Kongsi nor anyone else had interfered with the farming activities of the plaintiffs' family.

Only after Khoo Kongsi had entered into a joint-venture agreement was there any inteference with the plaintiffs' possession of the plot concerned.

As for the facts said to underlie the defendants' case these can, for the sake of brevity and convenience, be dealt with when the substantive issues fall to be considered.

Before embarking upon a consideration of the issues both of fact and law which arise upon the merits, I must direct my attention to a number of objections based upon points of law and procedure advanced by Counsel for the defendants.

**What was the effect of the joinder of D3 and D4 after issue of the writ ?**

The point taken by Counsel for the defendants was that a plaintiff cannot, by an amendment, introduce a cause of action which arose after the issue of the writ. [See **Odger's Principles of Pleading & Practice** (22nd Edn.) 162-163] .This was because any amendment relates back to the date of writ and therefore any amendment to include a subsequent cause of action cannot relate back. [See **The Supreme Court Practice 1991** Vol. 1 p.363). The case of *Chuan Chow Maritime SA Panama v. K.S.A. S. Bulk Sea Transport* The Times 25 February 1984 noted [1983-84] 3 Litigation 214 was cited for the proposition that any inclusion of the subsequent cause of action requires the consent of the defendant, without such consent an amendment to include a subsequent cause of action be allowed.

When the application for joinder by summons in chambers (En. 62 ) was made by the plaintiffs,

to add D3 and D4, on the ground that it was they and not D1 and D2, who as developers and contractors, were working on the plot concerned at the material time, that is to say, on 18 March 88, Counsel for D1 and D2 did not object and an order was made accordingly.

It was because of this that I had , at the outset of the application to discharge the *ex parte* interlocutory injunction restraining D1 and D2 their servants or agents as developers and contractors from entering the plot concerned, substituted D3 and D4 for D1 and D2, respectively, in the order granting the interlocutory injunction though only after I had given Counsel on both sides the opportunity of being heard on the point. All that Counsel for the defendants then said was "The third and fourth defendants have complied with the order", which I took to be an unqualified admission that it was D3 and D4, their servants or agents, who were working on the plot concerned at the material time.

There is another matter I must refer to. Some three days before I gave my judgment [reported *Cheng Hang Guan & Ors. v. Perumahan Farlim (Pg) Sdn. Bhd. Ors.* [1988] 3 MLJ 90] dismissing the application for discharge of the interlocutory injunction, I had enquired from Counsel for the defendants when was it that D3 and D4 had replaced D1 and D2 as developers and contractors, respectively, as had been contended by Counsel for the plaintiffs. Counsel for the defendants replied that they required the case to be stood down to seek instructions. Upon resumption, the Court was informed by Mr.Yeoh, Counsel for the defendants, that:

> the third defendants took over the rights and liabilities of the first defendant with effect from April 1982. The third defendants have been registered lessees since August 1983. The second and fourth defendants were appointed earth contractors and they remain so up to today. The second defendants were appointed by the first defendants in December 1981. The fourth defendants were appointed in April 1982.

Whereupon Counsel for the plaintiffs enquired "who was working on the plaintiffs' plot at the time of the alleged wrongful acts complained about and which occurred on 18 March 1988". In answer, Counsel for the defendants replied that it was "the third and fourth defendants who were working there then."

Based upon the material aforesaid, it is obvious that the cause of action against D3 and D4 arose from the alleged wrongful acts committed by them on 17 March 1988, that is to say, before they were joined as defendants pursuant to the order of court dated 21 March 1988 and so the plaintiffs were not introducing a fresh cause of action against D1 and D2. It is not surprising, therefore, that when application had been made to join D3 and D4 as defendants and the consequential amendments made to the amended statement of claim, Counsel for the defendants raised no objection thereto.

But, if Counsel for the defendants is correct in his contention, and objection had been taken in limine, that is to say, on the hearing of the application for leave to amend, as undoubtedly it should have been, and the objection upheld, the plaintiffs could have issued a fresh writ citing D3 and D4 as defendants and then applied for consolidation of the two actions. This, however, was not done but, instead, Counsel for the defendants raised no objection to the application for leave to amend by joining D3 and D4 as co-defendants. The question therefore arises whether assuming Counsel for the defendants is correct in his contention that the joinder of D3 and D4 was legally impermissible, the objection should be entertained at all, at this very late stage, when perhaps, any cause of action the plaintiffs might have against D3 and D4 would be barred by limitation. Clearly, it would be neither right nor fair to entertain the objection now, and so I must rule that assuming there was an irregularity in the order for the joinder of D3 and D4, the same had been waived by reason of Counsel for the defendants having raised no objection on the hearing of the application for leave to amend.

The first preliminary objection is accordingly overruled.

**Was the order for re-amendment of the summons in chambers dated 21 August 1991 valid?**

The second preliminary objection taken by Counsel for the defendants was that the re-amendment of the statement of claim to raise the alleged trespass on 21 August 1988 ought not to have been allowed for the same reasons as had been advanced in support of the first preliminary objection.

In reply, Counsel for the plaintiffs contended that the conduct of the defendants right up to the time of judgment was relevant to the

question whether exemplary damages ought to be awarded and, in support the case of *Drane v. Evangelou & Ors.* [1978] 2 AER 437 (where non-compliance with an injunction was taken into account in awarding exemplary damages) was cited.

I also note that the statement of claim as amended, did distinguish between the conduct of D1 and D2 on 18 June 1982, which it was said constituted a trespass and resulted in loss to plaintiffs, and the conduct of D3 and D4 on 17 March 1988, which it was said also constituted a trespass and resulted in loss to the plaintiffs

My attention was also drawn to the following time table of events:

1.4 The cause of action against D3 and D4 were included in the statement of claim with the consent of the solicitors of all the defendants. The sequence of events relating to this was as follows:

(a) On 21 March 1988, by a summons-in-chambers dated the same day (Enclosure 62), the plaintiffs had applied to (i) add D3 and D4 as parties and for an order that ( ii) the plaintiffs be at liberty to amend the writ and the statement of claim to include D3 and D4.

(b) There being no objection to the application by the solicitors for the defendants represented by their Counsel Mr.Yeoh Jin Aik and Mr R. Rajasingam, an order in terms of the application was granted and the matter proceeded as if the amendments had been effected.

(c) Pursuant to this order, the solicitors for the plaintiffs then proceeded to make amendments to the writ and statement of claim on 25 March 1988. This amended writ and statement of claim, marked as Enclosure 73, was reissued by the High Court Registry but, only on 11 February 1989.

(d) The amended writ and statement of claim was then served on the Solicitors for the defendants on 13 February 1989.

(e) When the defendant's Solicitors did not file their defence, the Solicitors for the plaintiffs by a letter dated 6 April 1989, asked them to file their defence within 48 hours.

(f) By a letter dated 8 April 1989 the defendants' Solicitors replied that they did not recall any application having been made for the amendments in the terms set out in the amended statement of claim.

(g) Consequently, the Solicitors for the plaintiffs made an application by a summons-in-chambers dated 26 May 1989 (Enclosure 76) for the statement of claim to be amended accordingly.

(h) The application was heard on 21 August 1989, and was not opposed by the Solicitors for the defendants.

(i) Consequently, the amended writ and statement of claim was issued out of this Court on 23 August 1989 (Enclosure 78), and served on the defendants' Solicitors on 30 August 1989 and the matter proceeded to trial.

In the circumstances, I consider that leave to amend was quite properly given and so the second objection is overruled.

**If the order dated 21 August 1991 giving the plaintiffs leave to re-amend the summons in chambers was valid, were the requirements of Order 20 rule 9 with regard thereto complied with ?**

It was further argued by way of alternative and this was the third objection that the order granting leave to amend by adding D3 and D4 as defendants with consequential amendments to the amended statement of claim (to raise the alleged trespass by D3 and D4 on 21 August 1988) was granted on 21 August 1991 but the requirements of O. 20 r. 9 for the implementation of the order had not been complied with within the 14 day period stipulated therein, with the result that the Order had lapsed and so the re-amended defence and counterclaim issued by the Court on 23 August 1989 and served upon the solicitors for the defendants on 30 August 1989 should be ignored.

In reply, Counsel for the plaintiffs had drawn my attention to these facts:

Leave to re-amend the amended statement of claim was granted by the Court on 21 August 1991 so as to allow the plaintiffs to raise the allegation of trespass by D3 and D4 on 21 August 1988, and the re-amended statement of claim had been filed in the Registry of this Court

on 29 August 1991, - that is to say, well within the time limited for doing so - the trial duly proceeded on the basis that the amended statement of claim had been duly amended but the Registry had yet to return the re-amended statement of claim with the required endorsement of the Senior Assistant Registrar thereon. The Solicitors for the plaintiffs did, however, serve upon the Solicitors for the defendants an unindorsed copy of the re-amended statement of Claim on 29 August 1991. Clearly, the plaintiffs could not have done anything more and such lack of diligence as there was must be ascribed to the registry and not the plaintiff's solicitors and so I do not consider that there has been any breach of O. 20, r. 9 of the Rules of High Court.

Accordingly, the alternative objection raised to the joinder of D3 and D4 is also overruled.

**The *Locus Standi* points**

It was contended by counsel for the defendants that upon the evidence led by plaintiffs, the suit was bad for non-joinder; in that Cheng Lye Hiang (PW1) ought to have been joined as a plaintiff. In particular, it was contended that since this was a joint claim for loss allegedly caused to joint property in which it was said that P1, P3 and PW1 had a vested interest, no award could be made by the Court in respect of the claim for losses sustained: as a result of the events of 1988 without joining all three of them as co-plaintiffs.

The term *locus standi* or standing in a court of law means entitlement to judicial relief apart from questions of the substantive merits and the legal capacity of a plaintiff.

In considering the *locus standi* objection there are two principles I have to keep in the forefront of my mind. First, I am bound to proceed on the basis that everything alleged in the statement of claim and in the documents relied upon by the plaintiffs is true. Secondly, the jurisdiction to uphold a plea of no *locus standi* should only be exercised very carefully in circumstances where there is no possibility of doubt.

The authority which I should like to cite in support of the two principles aforesaid is the case of *Hayes v. Bristol Plant Hire Ltd. & Ors.* [1957] 1 AER 685, an action by the director of a company for a declaration that he had been wrongfully excluded from the board, and where a preliminary point had been taken that the action was misconceived so that the court had no jurisdiction to entertain it further. The following passages in the judgment of Wynn-Parry J. would appear to be in point:

> ... I am bound to proceed on the basis that every statement in the statement of claim and every assertion in the documents referred to therein are true ... (at p 686E).
>
> Now again I pause to remind myself that I am dealing with a preliminary point going to jurisdiction. It is open to the court to stop an action such as this in limine if, on a point being properly taken, it thinks right to do so, and generally speaking, if a point as to jurisdiction is taken, it is the duty of a court to bring the proceedings to as early an end as possible. At the same time, it is quite clearly established that it is a jurisdiction which should only be used very carefully and in circumstances where there is no possibility of doubt as to the lack of jurisdiction (at p 688E-F).

It is with the above principles in mind that I ask myself the question: Was the non-joinder of PW1 as a co-plaintiff fatal to the plaintiffs' claim?

It is true that if several persons are joint owners of any land or premises affected by trespass, they should all, as a rule, be joined as co-plaintiffs, in the action.

But, in the present case, no objection was taken to the non- joinder of PW1 at the trial and it was only at a very late stage that Counsel for the defendants had in his final written submission taken the point. O. 15, r. 6 (1) provides that

> no cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party; and the court may in any cause or matter determine the issues and questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

It is true to say, however, that this rule does not alter the legal principles with regard to actions, and it is still necessary to have before the court the proper parties necessary for determining the point at issue. [See e.g. *Performing Right Society Ltd.v. London Theatre of Varieties Ltd.* [1924] AC 1 *Walter & Sullivan Ltd. v. J. Murphy & Sons Ltd.* [1955] 1 AER 843.

Now, according to the evidence adduced on behalf of the plaintiffs, at all material times:

(a) after the death of Cheong Au Pit the plaintiffs and PW1 continued to live on the farm,

to cultivate vegetables and to rear livestock thereon and to enjoy the income as aforesaid.

(b) during the lifetime of Cheong Au Pit, the plaintiffs and PW1 jointly worked on the farm, the income derived therefrom being divided amongst themselves.

If true, it could be reasonably inferred from the evidence aforesaid, that P2 who had been paying the rent and managing the farm for the plaintiffs and PW1 was in the position of a constructive trustee of the farm for the benefit of herself, the other plaintiffs and of PW1. Consequently, P2 alone could maintain the suit to protect trust property and recover damages and obtain other reliefs in respect of injury done to trust property.

I would therefore dismiss this branch of the *locus standi* objection.

Another branch of the *Locus Standi* objections was that the plaintiffs have no title to the plot concerned and so could not maintain this suit.

The submissions advanced by Counsel for the defendants in support of this plea may conveniently be taken from his written submission and are as follows:

6.1 It is not in dispute that:

(a) Cheong Au Pit died intestate in 1969;
(b) the tenancy of the vegetable farm was not transferred to P1 and P2 unlike the dwelling house 258K.

6. 2 It is however alleged that Cheong Au Pit, just before he died, made a gift of the vegetable farm to P1, P2, P3 and PW1 orally. The further & better particulars alleges that the plot concerned "was transferred" ( see p. 31 of BP). P2 did not testify to this fact. If a party does not testify to it then ordinarily the court should ignore it. It is for a party to allege and prove its claim: *secundum allegata ad probata.*

6.3 It was PW1 who said so: see her evidence on 20 August 1991 ( in the morning). She was cross-examined: house 258K given to P1 and P2 only but the vegetable plot was given to 4 persons P1, P2, P3 and PW1. Before his death no steps taken to effect the gift (see her evidence on 24 August 1991 in the morning). There is nothing to show that Khoo Kongsi were aware of the death of Cheong Au Pit until September 1972 when a written request was made to transfer dwelling house No. 258K (see AB2 p.99).

6.4 We submit that the alleged gift is invalid and ineffective BECAUSE

(a) it is a gift which involves the gift of an interest in land and such requires writing, as the law then stood in Penang; the Statute of Frauds applied in Penang until the application of the Contracts Act 1950 to Penang on 1 June 1974;

See Arulanandom J's judgment that Statute of Frauds applied in Penang; *Kok Ek Chooi v. Cheah Soon Neoh* [1982] 1 MLJ 219.

(b) even if the transaction were one of assignment, the lack of writing renders the assignment invalid;

Section 4 (3) of the Civil Law Act 1956 requires writing; see also the position that prevails in Singapore where an assignment of a tenancy was held to require a deed: *VM Peer Mohamed v. Great Eastern Life Assurance* [1982] 2 MLJ 298 which was approved by the Privy Council at [1985] 1 MLJ 329, 332 per Lord Templeman;

(c) Equity would not perfect an imperfect gift: the rule in *Strong v Bird* [1969] LR 18 Eq 315 as to which see Snell, Equity (29th Edn) pp 124-125 (1990); none of the conditions to make an imperfect gift effective exist in this case;

(d) the property would still remain in the estate of Cheong Au Pit and in the absence of letters of administration the present plaintiffs would have no standing to maintain any action; the point was previously made in the interlocutory proceedings before Mustapha Hussein J in AB2 p 5B (last sentence).

The submissions advanced by Counsel for the plaintiffs in reply may also be conveniently taken from his written submission and are as follows:

1. Before he died Cheong Au Pit gave his vegetable plot which included the assets on

the plot and the tenancy coupled with equity of the plot to P1, P2 , P3 and PW1.

Pursuant to this, the plaintiffs and PW1 worked the vegetable plot, used the income to support themselves and their families, and shared the remaining profit among themselves. There was no condition against sub-letting or assigning the tenancy of the vegetable plots. The only requirement of Khoo Kongsi appears to be that the assignee of a tenancy, if he wanted to have himself registered as a tenant, had to appear before the Board and agree on the terms. Cheong Au Pit's gift of the vegetable plot to the plaintiffs and PW1 had been perfected by their possession and cultivation of the vegetable plot during Cheong Au Pit's lifetime and thereafter.

2. The Statute of Frauds has no application to the gift of the vegetable plot to the plaintiffs and PW1 which had been perfected while Cheong Au Pit was still alive. This is not an action based on any contract for the sale, or other disposition of land, or any interest in land. Failing to see this distinction would, in the words of *Arulanandom J. in Kok Ek Chooi v. Cheah Soon Neoh (ibid*), be"to indulge in ostrichism".

In my view, provided always that the plaintiffs are able to establish the essential facts relied upon by Counsel on their behalf - and this is a question I shall have to consider later - I agree with Counsel as to the legal consequences which flow from those facts and so I would overrule this branch of the *locus standi* objection.

**Self-Help**

I accept the proposition, as indeed I am bound to, by reason of the judgment of the Supreme Court in *Leong San Tong Khoo Kongsi v. Poh Swee Siang***,** [1987] 2 MLJ 611 that if, but only if, the plaintiffs are held by the Court to be trespassers in law an issue which I shall have to consider later in this judgment then the remedy of self-help would be available to D1 and D3.

**Res Judicata and Issue Estoppel**

It was contended by Counsel for the defendants that the plaintiffs' claim to the portion of the plot concerned etched black in P14 was barred by reason of the judgment of Mustapha, J. reported under the name of *Cheng Hang Guan & Ors. v. Perumahan Farlim (Pg) & Anor.* [1983] 1 MLJ 348, at 349 col. 1 A, B.

The material facts so far as this part of the case is concerned were these:

The plaintiffs had obtained an injunction to restrain D1 and D2 from trespassing upon their dwelling houses and vegetable plots. That injunction was later dissolved upon the application of the defendants therein (see the judgment of Mustapha J.) and there was no appeal from that decision.

Accordingly, it was contended that the dissolution of the injunction meant that the plaintiffs had no interest in the portion of the plot concerned, etched black in P14, and so the plaintiffs' claims to that portion were barred by res judicata and issue estoppel. In support, the case of *Government of Malaysia v. Dato Chong Kok Lim* [1973] 2 MLJ 74 wherein the well known proposition that a decision at one stage of the proceedings is binding on the parties, not only in subsequent proceedings between the same parties, but also at a later stage in the same proceedings.

I regret I am unable to accede to this branch of the submissions of Counsel for the defendants.

In *Cheng Hang Guan & Ors. v. Perumahan Farlim (Pg) Sdn. Bhd. Ors. ( ibid*) I had occasion to consider the effect of the judgment of Mustapha J. What I said at p. 93, Col 2, B-C was this:

> In my opinion, the order of Mustapha J. refusing the plaintiffs the interlocutory injunction in so far as the vegetable plot was concerned, on the ground that damages would be an adequate remedy, was merely a *prima facie* view and lacked the essential element of finality since it is always open to the High Court, at the final hearing, to review the question involved and to arrive at an opposite conclusion in the light of all the evidence, both oral and documentary, should the circumstances so require; Accordingly, the legal effect of the refusal of the interlocutory injunction was simply, that at the interlocutory stage, based on the limited material then available, the plaintiffs were not entitled to the injunctive relief claimed.

I can think of no reason for departing from anything I had then said and I would add, that in any event, Mustapha J. did not decide that the plaintiffs had no interest in the portion of the plot concerned etched black in Exhibit P14.

Accordingly, I would overrule the pleas of res judicata and issue estoppel.

Having disposed of the preliminary objections, I must now embark upon a consideration of the merits. The issues which arise as regards this part of case, may be stated thuswise:

1. What was the area of the plot concerned of which the plaintiffs had possession? More particularly, whether, at all material times, the plaintiffs have been in possession of the plot concerned comprised in Lot 2532, Mk. 13, DTL, Pulau Pinang having an area of approximately 121,619 sq. ft. (or 2.8 acres) which is shown and delineated in orange in the Survey Plan, Exhibit P16?

2(a) Whether, at all material times, the plaintiffs were, both in law and in equity, entitled to possession of the plot concerned including the houses, pig sties and structures erected thereon?

(b) Were the Notices to Quit served upon the plaintiffs valid in Law?

3(a) Whether D1 and D2 had on 18 June 1982 committed trespass and created nuisance on the portion of the plot concerned etched black on Exhibit P14 ?

(b) Whether D3 and D4 had on 17 March 1988 committed trespass and created nuisance on the portion, etched orange on Exh. P14 and have been in unlawful occupation of the portion etched black on Exhibit P14.

4(a) If the plaintiffs succeed in establishing liability against D1 and D2 and D3 and D4, then what is the appropriate sum to award by way of damages?

(b) Whether the plaintiffs are entitled to aggravated damages and/or exemplary damages?

(c) Whether the plaintiffs are entitled to an injunction?

(d) Whether the plaintiffs are entitled to any other and if so what remedies?

**As to Issue 1 - What was the area of the land concerned in the possession the plaintiffs?**

There was an acute conflict of evidence on this question if the versions of the plaintiffs and the defendants were compared.

The plaintiffs' contention being that the area in their possession was 2.8 acres or approximately 121,619 sq. ft., while the defendants' version was that the area was as little as 9000 sq. ft.

Broadly stated, the evidence relied upon by the plaintiffs and the contentions advanced by their Counsel were as follows:

1. The evidence of P2 who, under cross-examination, stated that the area of her vegetable plot was 2.8 acres.
2. The evidence of PW1 who stated that at the time of Cheong Au Pit's death in 1969, the area in their possession was the area delineated in orange on Exhibit P16, that is, approximately 2.8 acres.
3. Exhibit P16 is a survey plan prepared by a qualified and competent surveyor on 10 September 1982 for use in the interlocutory proceedings in this case and although 9 years had elapsed since P16 was first used as an exhibit in case the defendants had not produced any plan drawn by their surveyor contradicting or qualifying the accuracy of Exhibit P16.
4. Khalid bin Abdul Aziz (PW9) had visited the farm on 9 September 1982, carried out the survey and produced Exh. P37A and 37B which show the measurements and other particulars such as houses, pig sties, vegetable farm, etc. These documents produced by a competent surveyor corroborate P2 and PW1's evidence that the plaintiffs have been in possession of nearly 2.8 acres of land.

On the other hand, the evidence relied upon by the defendants and the contentions of their Counsel were as follows:

1. The plaintiffs admitted as a fact in the proceedings before Mustapha Hussain J. that the area let was 9, 000 sq. ft. and the rental paid was 90 cents at 10 cents per 1, 000 sq. ft. per month. See AB2 p. 2C (Notes of Proceedings on 21 July 1982). These notes of proceedings (pp. 1 to 7 of AB2) were admitted as to the truth of its contents in this trial on 19 August 1991.
2. Independent (and unchallenged) evidence of Khoo Peng Tee (the trustee) by his affidavit pp. 64-68 of BA (1) and Khoo Gin Pye by his affidavit (pp. 74 -77 of BA (1) as to the policy of Khoo Kongsi to charge 10 cents per 1000 sq. ft. of vegetable land and as Cheong Au Pit was paying 90 cents for his vegetable plot the area let, with

reference to the rent, is only 9,000 sq. ft. (Neither was called as a witness at the trial, the latter having died before the hearing).

3. Further, the evidence shows that the vegetable plot let to Cheong Au Pit was the plot adjoining house 258K. Since that area, as claimed by the plaintiffs, exceeds 9,000 sq. ft. it is clear that the area etched black in P14 cannot be part of the land let to Cheong Au Pit. Consequently, none of the plaintiffs or the estate of Cheong Au Pit can lay any claim to this area.

Counsel for the defendants attacked evidence relied upon by the plaintiffs in these terms:

1. The admission of fact, before Mustapha Hussain J, referred to in para 5.2 *supra*, is binding on the plaintiffs and no attempt had been made, at anytime, to withdraw or correct this admission. It is therefore too late to contend otherwise now.

2. An admission once made is binding on the parties and their privies and the fact admitted need not be proved for the admission dispenses with the proof.

   Note, s.17 of the Evidence Act 1950.

   Field, **Law of Evidence** (11th Edn.,)(1990) Vol. 2 page 1245 29 "Admission of Adverse Party " it is the best piece of evidence".

   Cross' **Evidence** (6th Edn.) (1985) page 517 "Admissions" ("A party's statement...") 1 *Ibid.* 521 "Vicarious Admissions") ("Admissions by those in privity ... ").

3. In accordance with this judicial admission in open court that the plaintiffs were required, and they undertook, to produce a surveyor's plan showing the area of 9,000 sq. ft. of the vegetable land (See AB2 p. 2C).
4. The plaintiffs delivered Exhibit P16 to D1 and D2's solicitors in purported compliance with the undertaking, contrary to the admission and undertaking P16 showed the area to be 121,000 sq. ft.!

The defendants challenge the accuracy and admissibility of P16 as follows:

(a) The plaintiffs placed great reliance on P16 and P14. The former came from PW8 and PW9 whilst the latter came from PW2. The **common source of information as to both is PW1.** The veracity of the PW1, including her own evidence on this, is very much in doubt.

(b) There is also a challenge to the manner in which the measurements shown in P16 were taken. These measurements were, as stated earlier, carried out to show the 9, 000 sq. ft was occupied. For this reason, DW6's assistance was sought to verify the actual area of 9,000 sq. ft. but DW6, for the reasons set out in paragraph 7 of his Affidavit [pp. 69-73 BA (1)], was unable to point out the area occupied. The lack of compass points was admitted by PW8 who also confirmed paragraph 7 [at p.71 of BA (1)].

(c) Despite the fact that BA( 1) pages 69-73 was filed well in advance, the plaintiffs took no steps to verify the situation. The plaintiffs only looked for PW8 in September 1991 (in the middle of the trial).

(d) The data in P16, as well as in D38 ( the field diagram), were said to originate from the **field book. I**t was also based on the traverse done by Syarikat KT Wah. The accuracy of the latter's traverse was not verified. All PW8 can say is that it is the practice not to query the traverse of another surveyor. This may be professional courtesy but it is certainly not a guarantee of correctness. There is no supporting evidence. DW6's report (Exhibit D56 ) is otherwise .

(e) PW8's own evidence states that without the field book there is insufficient material to justify the accuracy of the survey. Further in his own conclusion to P37 (the report), he states that there are insufficient data to render the measurements accurate. That conclusion was repudiated by PW9, the field technician. He said there were sufficient number of ocm points. if that be so then it is not borne out.

(f) There is another matter of importance: that PW9 used a C.P. (i.e. certified plan), which is not even mentioned in P37 - a material omission. Further, the c.p. number is not referred to in the diagram (D38) or even in P16. The omission is unusual.

(g) The Field Book is missing. PW8 was never told that his plan was being challenged from the very inception, that is to say, September 1982, some two weeks after the alleged survey. Had PW8 been so told, the field book, on which the data depends, would have been preserved. The fault for

the loss or unavailability of the field book must rest squarely with the plaintiffs.

(h) The plan contains no certification or authentication by PW8 except to bear his signature. There are no contemporary records of what the instructions were, what information was provided to PW8 and his staff. In the absence of these and the field book the evidence of PW8 and PW9 as well as the plan, exhibit P16, is highly suspect.

(a) P14 was drawn by PW2 in his office after a visit to the site in March 1988, on the instructions of the solicitors for the plaintiffs. He had no personal knowledge of the contents. All the information therein were provided by PW1, the source of whose knowledge is yet to be proved by admissible evidence.

(b) There is also a conflict in the evidence of PW1 and PW2 as to the circumstances under which and the place where and the time when P14 was drawn. According to PW1, P14 was drawn by PW2 independently and shown to her. P16 was made available to PW1 without being told that the accuracy of P16 has been chaIlenged.

(c) PW2 was unable to answer as to how and when he observed the stream, which was not in existence in March 1988. He was forced to fallback on P16. Further he had no other records of the contents in P14.

(d) PW2 had not visited the site before and he was unable to say of his own personal knowledge the extent of, or the kind of cultivation on, and the items destroyed either in 1982 or for that matter even in 1988.

It was also said that there appear to be several inconsistent versions of the area as claimed by the plaintiffs for example,

(a) an earlier map extracted by defendants' Surveyor Anthony Chai Wee Siong a director of D3 in charge of building work (DW6) (see p. 5 of DAB defendants), on which he and Ng Bock Tye (DW4) were cross-examined shows the area occupied to be far less than shown in P16;

(b) the measurements done at the request of the Tripartite Committee in the presence of the representatives of the Residents Association, assisted by PW1 (as admited by her in cross-examination) show a lesser area; see the plan D40 and the minutes of the Tripartite Committee meeting D41 and D42, the contents of which were proved by DW2 and DW4; this measurement is far less than the 100,000 sq. ft.;

(c) the measurements done in 1969 by Khoo Kongsi show that the area was again less than the area now claimed; the book of measurements was tendered as ID D45; it emanated from Khoo Kongsi; it was handed to DW1; it was produced by DW1; being a document of more than 20 years, its genuineness is presumed by s. 90 of the Evidence Act; the documents shouId now be marked as D45;

It was submitted that when the measurements were done in 1969 there was no reason for Khoo Kongsi to misstate the true position and none was suggested by the plaintiff; this went to show how uncertain and unrealiable the plaintiffs' own case is on the question of the area let to Cheong Au Pit.

Counsel for the defendants also contended for the following conclusions on the law:

1. By occupying a larger area than was let the said Cheong Au Pit was already a trespasser which trespass was continued by the plaintiffs.
2. There is no question of waiver by Khoo Kongsi as to the area occupied; the failure to take action cannot amount to a grant of the tenancy of the larger area occupied. Khoo Peng Tee (the trustee) has explained in his affidavit the reasons why action was or could not be taken. There is no plea of any waiver in the pleadings. The plaintiffs had filed no reply to the defence of D1 which squarely raised this issue.
3. The evidence of PW1 as to the area let to Cheong Au Pit is wholly hearsay and inadmissible; she has no personal knowledge whatever.

In reply, Counsel for the plaintiffs submitted as follows:

1. The defendants have not produced any evidence of the alleged policy of Khoo Kongsi to charge 10 cent per 1,000 sq. ft. of vegetable land. DW3, Secretary of Khoo Kongsi, could not produce any records to substantiate this claim although he had looked at all the minutes of Khoo Kongsi either by himself or with the assistance of another person. All he could produce was

a notice issued in 1941. He heard of this policy from old trustees only in 1984 during Poh Swee Siang's case. He does not know of even one farm in Thean Teik Estate where rent is collected at the rate of 10 cent per 1,000 sq. ft.

2. Exhibit D48, the minutes of Khoo Kongsi, clearly shows that there was no such policy. Each application for renting vegetable land was considered on its own merits by the Board who then fixed the rental and other terms of the tenancy. Cheong Au Pit's tenancy must have commenced well before 1938 and that could explain the low rental paid by him.

2.13 If the area rented to Cheong Au Pit was 9,000 sq. ft., as alleged by the plaintiffs, then Khoo Kongsi would have taken action against him for occupying 121,000 sq. ft. but no such action was ever taken although according to ID 45 (said to be Khoo Kongsi's Book of Survey, which has not been proved) Cheong Au Pit was alleged to be occupying 49, 000 sq. ft. in 1969. Until D1 came into the picture and the alleged notices of termination were issued, Khoo Kongsi had been accepting rent from P2 for the area in the possession of the plaintiffs. Khoo Kongsi would not tolerate even the chopping of a branch of a cempedak tree. Would they permit a tenant to occupy an area 13 times the size rented by him? The only reasonable inference from Khoo Kongsi's conduct is that Cheong Au Pit was in possession of 121,000 sq. ft. of land with their consent, paying a rental of 90 cents.

As regards the contention of Counsel for the defendants that the area occupied by the plaintiffs is only 49,238 sq. ft. having regard to the measurements taken by David Tan Yok Seng (DW2), recorded in D40, and not 2.8 acres as claimed by the plaintiffs, Counsel for the plaintiff submitted as follows:

(a) D40 was drawn by David Tan, an employee of the defendants, who has no training experience or competence in survey work. The area was calculated by DW1, a highly interested party, in the absence of the plaintiffs. DW1 also has no training experience or competence in survey work. The plaintiffs as soon as they came to know of the alleged results of the "survey", objected to the figures (Exhibit D7), but D3 did not take any steps to get an accurate survey done by a qualified surveyor.

(b) The area in the possession of the plaintiffs has been hotly disputed since: July, 1982. Therefore, why is it that neither D1 nor D3, who are big developers, carried out an independent survey so as to ascertain the area instead of asking DW6, a qualified surveyor to draw squares and rectangles on the survey plan prepared by Datuk Ayob, Exhibit P16. They had an opportunity to verify the truth of the plaintiffs' claim and the accuracy of Exhibit P16 but they chose not to take advantage of it. Why ? The only reasonable inference is that they did not want their own surveyor to confirm the claim of the plaintiffs and the accuracy of Exhibit P16.

As regards the contention of Counsel for the defendants that the plaintiffs admitted before Mustapha Hussain J that the area let was only 9,000 sq. ft. and that the rental was 10 cents per 1,000 sq. ft., Counsel for the plaintiffs submitted as follows:

(a) The notes of **Mustapha Hussain J** are brief and incomplete. In his submission on 29 September 1982 (AB2 para 2 letter F) the plaintiffs' counsel, Mr. Tan relied on the affidavit of P1 and P2 which clearly state that they were occupying about 3 acres of land (BA1 p. 47 para 4). If he had admitted that the area occupied by the plaintiffs was only 9,000 sq. ft., why did he submit otherwise at the hearing of his application?

(b) the application for the injunction proceeded on the basis that there was a dispute as to the area rented by the plaintiffs and the defendants' Counsel submitted that Khoo Kongsi could not have rented out the area claimed by the plaintiffs because of the alleged policy of Khoo Kongsi and the by-laws of the local authority on this. Therefore, where is the judicial admission of the plaintiffs as submitted by the defendants' Counsel?

( See BA1 p. 17 para 15, 16)
( BA1 p. 71 para 5, 13, 14, 15, 16)
(AB2 p. 4 letter F)
(AB2 p. 5 letter F)

(c) If there was such an admission, then why did the defendants call witnesses to testify on the area in the possession of the plaintiffs?

As regards the contention of Counsel for the defendants that the area etched black on Exh. P14 cannot be part of land let to Cheong Au Pit, Counsel for the plaintiffs submitted that this contention was open to the following criticisms:

(a) Exhibit D40 clearly shows the area etched black on Exhibit P14 to be part of the plaintiffs' farm.
(b) David Tan (DW2 ) testified that the said area was part of plaintiffs' farm.
(c) If the said area was not part of plaintiffs' farm, then why negotiate (as claimed by the defendants but denied by the plaintiffs) with PW1 as agent of the plaintiffs.

After careful consideration, I uphold the submissions of Counsel for the plaintiffs because, with respect, I did not consider that Counsel for the defendants had any real answer to the reply of Counsel for the plaintiffs, so far as this part of the case is concerned.

It follows that I find as a fact that the area in the possession of the plaintiffs was at all material times to this suit 2.8 acres or approximately 121,619 sq. ft.

**As to Issue 2 - What Notice to Quit was necessary to determine to the plaintiffs' tenancies of the farm and the two dwelling houses assuming such tenancies were not coupled with an Equity?**

Khoo Kongsi gave one month's notice to quit in respect of both the dwelling houses and the farm after the acts of alleged trespass on 18 June 1982.

The arguments advanced by Counsel for the plaintiffs in respect of these notices to quit were twofold:

(A) the period of the notice to quit was insufficient; and
(B) that Khoo Kah Seng (DW3) a trustee of Khoo Kongsi had no authority to instruct Khoo Kongsi's Solicitors M/s. Shearn Delemore & Co., to issue the notices to quit.

As to (A), namely, the sufficiency or otherwise of the Notice to Quit, the rival submissions of the parties must now be considered.

The gist of the submissions of Counsel for the defendants regarding this part of the case was that the period of one month's notice was sufficient to terminate the tenancy of both the farm and the two dwelling houses because:

(1) the conditions appearing in the rent receipts provided for one month's notice and a few of these receipts had been produced by the plaintiffs themselves when applying for interlocutory injunctions before Mustapha J;

(2) the surrounding circumstances, especially the fact that rent was paid by reference to the month; and the general notice by the trustees of Khoo Kongsi dated 1 March 1941 in Chinese with an English translation which said this:

NOTICE

Notice is hereby given that owners of houses built in Sin Kang Plantation not allowed to charge, mortgage, transfer, buy, sell, exchange, remove, and make repairs, alterations or additions to their houses, whether new or old, without the previous consent of the Kongsi in writing.

Should they be found to infringe any of the above conditions, the Kongsi shall have the right, after three months' notice shall have been given to the owners, to proceed with the demolition of the said house at the expense of the owners and no compensation, damage claim whatsoever will be entertained or paid by the Kongsi.

The Trustees,
Leong San long Khoo Kongsi

Penang 1 March 1941,

showed the temporary nature of the tenancies and some of these were produced at the trial of Poh Swee Siang on 30 June 1982 which went to confirm their genuiness and authenticity.

As to (1), the gist of the submissions of Counsel for the plaintiffs was that "the conditions" had been introduced for the first time on receipts issued to P2 on 31 October 1981, that is less than a year before the tenancies were terminated and decades after the plaintiffs and their ancestors had been staying on the plot concerned, and so had no contratual force.

It was also argued that "the conditions" were in English, which the plaintiffs who were illiterate

farmers did not understand and so it would be wrong to infer that the plaintiffs had by conduct accepted them as such. Accordingly, it was said that there was no material upon which it could be said that the plaintiffs had by their conduct accepted the conditions in accordance with the principles enunciated by Lim Beng Choon, J. in *Mohd. Ismail v. Lim Sok Cheng* [1988] 1 CLJ 335.

Now, a receipt is, of course, in law, only evidence of the payment of a sum of money; it does not consitute a contract nor can it have the effect of an estoppel. The true intention of the parties must be established by evidence at the trial. It is not difficult to cite an anthology of cases for these principles. My choice is *Lee v. Lancashire Yorkshire Railway Co.* [1871] LR 6 Ch App 534, 535 *Hockle v. London County Council* [1910] 26 TLR 580 and *Oliver v. Nautilus Steam Shipping Co.* [1903] 2 KB 639, 648.

Having said that, I accept that the inclusion of the inscription in the receipt stating that the period of one month"s notice would be sufficient to terminate the tenancy might, in certain circumstances, amount to a stipulation imposed by a landlord upon his tenant; see for example, *Loke Yung Hong v. Shanghai Furniture Co. & Anor.* [1948] MLJ 136, CA at 140 where Pretheroe Ag, CJ said this:

> Now, what was the legal effect of including those words in the receipt? I do not think that they can be regarded as being a clause in the contract to which the tenant agreed: rather I think they were a stipulation imposed by the landlord upon the tenant. it is true that neither the word "condition" nor the word" stipulation" appears, but this fact of itself, will not prevent the prohibition from being a condition (*Henniker v. Watt*). Evidence was given at the trial that the appellant has those words printed on every receipt he gives for rent or for any deposit made by a prospective tenant: that this is the common practice of landlords in Kuala Lumpur and finally, as I have already stated, that the first respondents knew that the effect of the words was to prohibit any assignment by them. In my opinion, therefore, these words define an event which was intended to end a state of things which, but for its happening, would have continued, and therefore they constitute a condition.

First of all, it would be convenient: to reproduce the conditions appearing on the reverse of the rent receipts dated 31 October 1981 (pp. 9/12 AB1) in respect of the vegetable lands and the dwelling houses.

In respect of the vegetable lands, the conditions were as follows:

1. This lease is optional to both parties, i.e. the Land-owners and vegetable gardeners (serving as ground tenant) carrying one months's Notice from either side for its termination.
2. Upon termination of lease, the vegetable gardeners hold the privilege to extend the lease up to the time when the last cultivated crops are harvested.
3. No party is bound to pay any claim/compensation in kind for the termination of lease.
4. The vegetable gardeners will maintain the land in vacant condition at all times and will refrain making construction of any erections altogether on the land.
5. If no cultivation of vegetables is made within one month's period and weeds are allowed to grow in place, the land-owners hold the right to cancel the lease forthwith without any written warning to the vegetable gardeners.

In respect of the dwelling houses, the conditions were as follows:

1. Rent collected is for site of house only.
2. No *ex-gratia* payment will be made when site is required by our Kongsi.
3. Notice is hereby given that all owners of houses, buildings, sheds etc erected in Sin Kang Estate are not permitted to repair or make alterations, extensions, enclosures, transfer ownership, change attap roof, corrugated iron roof, asbestos roof, pigstys, poultry pens, including the building of new houses etc., unless prior permission in writing has been obtained from the Trustees of the Khoo Kongsi.

   Should any ground tenant be found to have infringed any of the above conditions, the Kongsi shall have the right to demolish any building etc. at the expense of the owners and no compensation or claims will be entertained by the Kongsi.

In the present case, however, apart from the testimony of Khoo Kah Seng (DW3) a trustee of Khoo Kongsi, there is no evidence that the conditions appearing in the rent receipts whether in respect of vegetable lands or the dwelling houses had been introduced from the inception of the tenancies nor is there anything to show that the plaintiffs or their ancestors who had no knowledge of the English language could be said to have accepted the "conditions". (See e.g. *Balwant Singh v. Tong Lam & Co.* [1963] MLJ 33, per Rose, CJ at p 34 col 1 G)

Counsel for the defendants did point out that this witness had testified that the receipts

produced in Court bearing the condition concerned "formed part of receipts previously used, omitted for a while by mistake and then reinstated". It was suggested that if DW3's testimony on this point were untrue, the plaintiffs would have been expected to adduce evidence of past receipts by way of rebuttal.

On the other hand, Counsel for the plaintiffs, drew my attention to the fact that DW3 had admitted under cross examination that the conditions on the receipt were endorsed thereon only after 1976 but later qualified that by saying that the conditions were not new and had been endorsed on earlier receipts but that when challenged to produce duplicates or counterfoils of receipts issued prior to 31 October 1981 to P2 with the conditions endorsed thereon to support his assertion, was unable to produce even a single one. Upon then being reminded about his testimony in Poh Swee Siang's case, DW3 finally admitted that the conditions were indorsed on receipts only after 1976. And, in the case of the plaintiffs, DW3 admitted that the conditions had been endorsed on the receipts issued to them only since 31 October 1981 (See AB1 p. 9).

It was emphasised that although the defendants had produced the old Khoo Kongsi Notice dated 1 March 1941 (DAB p. 26) they had studiously refrained from producing even a single duplicate or counterfoil of receipt bearing the condition issued to the plaintiffs before 31 October 1981. Similarly, it was emphasised that although the defendant had produced documents (Ex D11 and 12) containing condition relating to tenancies of houses, they had not produced even a single document (whether Board minutes or notices) where the alleged conditions of tenancy of vegetable lands were recorded.

Even if Counsel for the defendants evaluation of DW3's testimony were accepted, it is not at all clear as to what DW3's source of knowledge was as to when the conditions appearing in the receipts were first introduced; it was not at all clear whether he had personal knowledge of these matters or even whether these alleged events occurred while he was a trustee. It looks very much as though his testimony regarding these alleged events was derived from information provided to him by others in which case it would be worthless as evidence being purely hearsay. Certainly, if what he said were true, I would have expected the defendants to have adduced in evidence counterfoils or duplicates of earlier receipts by way of corroboration. Khoo Kongsi was an association with many members and I would have expected it to have kept such records. It is true that neither did the plaintiffs produce rent receipts issued by Khoo Kongsi prior to 1981 but, it must be recognised, that in contrast to Khoo Kongsi they are illiterate farmers who might not have appreciated the importance of keeping old receipts.

But, more importantly, the onus of proving that the conditions on the receipt had contractual force was upon the defendants who were relying upon that condition and not upon the plaintiffs to prove converse. No adverse inference may therefore be drawn against the plaintiffs for this omission even assuming, for the sake of argument, such old receipts were available.

I must also add that the mere fact that on the hearing of their application for an interlocutory injunction before Mustapha Hussein J. the plaintiffs had themselves used the rent receipts bearing the conditions aforesaid, as evidence does not in any way debar them from contending at the final hearing that those conditions are invalid in law. The plaintiffs never relied upon the conditions on the rent receipts and, indeed, during the interlocutory proceedings, the plaintiffs' contention was that their tenancies were coupled with an equity while the defendants contention was that the plaintiffs tenancy was a mere monthly tenancy which had been determined by one month's notice to quit, and that thereafter they continued in occupation as trespassers.

Before this Court, the parties have persisted in those contentions. I therefore fail to see how it could be said that **whereas** at the interlocutory stage the plaintiffs had accepted the validity of the alleged conditions they had, at the final hearing, changed their tune. The plaintiffs have been consistent in the legal position they have taken both at the interlocutory stage and at the final hearing. I regret, therefore, that I cannot agree with the submission of Counsel for the defendants regarding this part of the case.

In the circumstances, I find that the conditions appearing in the rent receipts is devoid of legal effect and must therefore be disregarded in considering the question of the sufficiency or otherwise of the notice to quit.

As to (2), the gist of the submission of Counsel for the defendants was that any tenancy which

is void for want of registration would only take effect as a monthly tenancy where, as here, rent is paid by reference to the month. In support the Federal Court decision in *Lee Ah Low v Cheong Lep Keen* [1970] 1 MLJ 7 (Ali, FJ, Suffian FJ, Ong CJ) (dissenting) was cited. He also relied on the minutes of Khoo Kongsi (P48, p. 5) which indicated that even tenancies of Khoo clansmen were terminable on one month's notice as well as the testimony of a trustee of Khoo Kongsi, Khoo Kah Seng (DW3), that land could be repossessed by Khoo Kongsi at any time.

On the other hand, the gist of the submission of Counsel for the plaintiffs was that although rent had been paid on a monthly basis, it did necessarily follow that the tenancies could be determined by a month's notice. In order to determine the appropriate period of the notice to quit - and this was a question of fact - regard had to be had to the surrounding circumstances of each case and not just the mode of payment of rent. In support, the cases of *Syed Mohd Alsagoff v. Max Behr* [1883] 1 Kyshe 637, *Tay Boon Huat v. Kulsam Bee* [1914] SSLR 51; *A.L.M. Muthukaruppan Chettiar v. Haji Ibrahim* [1941] 1 MLJ 124 were cited.

In *Syed Mohd. Alsagoff v. Max Behr,* the Court held

> Whether a tenant, who holds for a term of years, and after the expiration of the lease continues to do so, paying rent for his holding, is a tenant from year to year otherwise, is a question of fact to be gathered from the circumstances; but ought to be such a tenant (sic) as is and fair between the parties. The leaning of authorities is, however, in favour of the presumption of the tenancy being from year to year; and the reason for this founded mainly on common sense and justice. Neither the practice in his Colony to let from month to month, nor the fact that by the former lease rent is reserved not by the year, but by the month, rebuts the presumption.

In *Tay Boon Huat v. Kulsam Bee*, the Court held that four months' notice would be reasonable for the determination of the tenancy of a market garden. The tenant had been in occupation of the land for about three years and was paying rent on a monthly basis.

In *A. L. M.M. Muthukaruppan Chettiar v. Haji Ibrahim*, Mc Elwaine CJ said this at p. 126:

> The principle of the English law in such cases as monthly tenancies is that apart from agreement as to notice, the notice must be reasonable in all the circumstances and the same principle should be applied here.

Counsel for the plaintiffs contended that having regard to the above authorities and the circumstances of the case, 1 year's notice would be reasonable to determine the tenancies. Counsel suggested that no distinction should be made between the period required for determining the tenancies of the dwelling houses and the tenancies of the farm because, on the facts, the two tenancies were interlinked and for a common purpose, that is for the livelihood of Cheong Au Pit and his family.

I note that the majority judgment in *Lee Ah Low v. Cheong Lip Kien (supra)* was considerably watered down by the Federal Court in *Yong Tong Hon. v. Siew Soon Wah & Ors.* [1971] 2 MLJ 105 (Ong CJ, Suffian and Gill FJJ). At p. 107 col 1 C to E Ong CJ speaking for the Federal Court, said this:

> Every case must, of course, be decided according to its peculiar facts. The distinction must be drawn between cases where the tenant can resist his landlord's claim on equitable grounds and others where he has no such grounds. An example is *Lee Ah Low v. Cheong Lip Kien*, a recent decision of this court. There the tenant was given a tenancy for 80 years during which period the landlord agreed not to increase the rent unless the assessment rate was raised by the Municipality and the tenant was at liberty to use the premises for carrying on any type of business. The monthly rent was RM100 and the tenant was given a month's notice to quit. No equity had been created in his favour, as in *Inwards v. Baker*, by his going into possession. Accordingly the sole question to be determined was whether the premises were held under a yearIy or monthly tenancy by reason of the lease being void for non-registration. That case was not as fully argued as it might have been, nor were the cases cited which have been brought now to our attention and carefully distinguished. The *ratio decidendi*, therefore, should not, in my view, be regarded as a binding precedent for all cases where premises are let for a term of years at a monthly rent under a lease void for non-registration.

It will be recalled Suffian FJ (as he then was) was a party to the decision in both *Lee Ah Low* and *Yong Tong Hong* and must therefore be taken to have concurred in the watering down of the majority judgment in *Lee Ah Low*.

In *Adler v. Blackman* [1953] 1 QB 146 two principles emerge; namely, first, as pointed out

by Sommerville at p. 148, the presumption as to the nature of the tenancy on holding over is a rebuttable presumption; secondly, as pointed out by Jenkins LJ at p. 152:

> what one is seeking here is the intention to be imputed to the parties from the fact that the tenant has remained in occupation with the consent of the landlord and has paid rent, after the expiration of the term of the original letting. As I have said, I think at highest in favour of the tenant the implication here, so far as it is based simply on those bare facts is equivocal owing to the absence of any reservation of rent expressed as an annual sum. It follows, in my view, that other evidence may be resorted to for the purpose of ascertaining what their true intention was.

Clearly, while the mode of payment of rent is an important factor in determining the question of the sufficiency of the period of a notice to quit it is not necessarily a decisive factor; other evidence (if available) must therefore also be thrown into the scales and weighed.

To return to the case of *Lee Ah Low*, it appears to me that that case is distinguishable from the present case on the ground that there, unlike here, the crucial issue revolved around a question of construction of a written tenancy agreement. As Ali, FJ who delivered the majority judgment of the Federal Court pointed out at p. 11 col 1 *et seq:*

> The answer to the first ground of appeal is that so far as the main question before the trial court was concerned with the validity or otherwise of the notice to quit it was clearly a question of law which fell to be decided in accordance with established legal principles acceptable to the courts in this country. The manner of payment of rent has always been the basis of consideration in the formulation of the principle stated in the English cases, which undoubtedly led the Judge to come to the conclusion as he did in this case. If the trial court had any discretion in the matter there might be ground for saying that the factors referred to by the appellant would be relevant for consideration. But this is not a case where the court has to exercise a discretionary power but to construe the effect of the relevant term of the written agreement.

It follows that in the present case there being no written tenancy agreement to construe in considering the question what was the nature of the tenancies of the farm and the two dwelling houses which the plaintiffs held of Khoo Kongsi and, more particularly, what notice to quit was necessary to determine those tenancies, assuming such tenancies were **not** coupled with an equity, I had to take into account not just the mode of payment of the rent but also other material factors, for example the conduct and intention of the parties, the contemplated user of the subject matter of the tenancies and other relevant circumstances of the case as a whole. In other words, I have a discretion which, of course, has to be exercised judicially.

According to Counsel for the plaintiffs the material circumstances which I have to take into consideration are these and here I would quote from his written submission: at p. 31 para 3.13 to p. 32: para 1.

(a) Cheong Au Pit and his family members are pioneer settlers who, through their own industry and initiative, have transformed a swampy jungle into a productive vegetable farm. Three generations have lived and worked the plot for their subsistence. This fact alone leads to the inevitable inference that the intention of the parties was that Cheong Au Pit's tenancy was not a monthly tenancy. If it was a monthly tenancy it is highly unlikely that Cheong Au Pit would have invested so much labour and money in developing the land and building his home there.

Cheong Au Pit's position cannot be compared with vegetable farmers who cultivate vegetable on the land of another with licence for a period of years. To Cheong Au Pit and his family, the farm has been their home and their source of livelihood for generations. Compare *Alsagoff's* case, where a tenant holding over after the expiry of the lease for a mere term of years was held to be a tenant from year to year.

(b) Cheong Au Pit or the plaintiffs did not breach any of the regulations of Khoo Kongsi.

(c) Khoo Kongsi practice was to allow the family of deceased tenants to continue farming on condition they paid rent.

(d) There was no condition for determination of both the house and vegetable tenancy by a month's notice . The unilateral introduction by Khoo Kongsi only after 1976 clearly shows that the tenancy of the plaintiffs were not monthly tenancy.

According to Counsel for the defendants, apart from the fact that rent was paid by reference to the month - and this was a matter of prime importance - the minutes of Khoo Kongsi (P48 p. 5 ) indicated that even the tenancies of Khoo clansmen could be determined by one month's notice and there was also the testimony of a trustee of Khoo Kongsi, Khoo Kah Seng (DW3) that land could be repossessed by Khoo Kongsi at any time.

There is, in my view, neither law nor custom which assists me in deciding what is a sufficient notice for the determination of the tenancies of the farm and the dwelling houses. So I must, in the exercise of my discretion, decide what is a reasonable notice regard being had to the particular circumstances of this case. This calls for a balancing exercise. In *Doe d. Martin v. Watts* [1789] 7 TR 83 Lord Kenyon said that:

> it would be extremely unjust that a tenant who occupies land should after he has sown it, be turned out of possession by an ejectment without any notice:
>
> > And it was in order to avoid so unjust a measure that so long ago as the time of the Year Books it was held that a general occupation was an occupation from year to year, and that the tenant could not be turned out of possession without reasonable notice.

Adopting that approach to the circumstances of the present case, I do not consider that one month's notice would be either right or just as constituting reasonable notice, whether in respect of the vegetable land (the farm) or the dwelling houses. In this context, I agree with the submission of Counsel for the plaintiffs that there is no distinction in principle between the vegetable land (the farm) and the dwelling houses in so far as the period of the notice to quit is concerned because the two tenancies were interlinked and had a commom purpose, namely, the livelihood of Cheong Au Pit and his family.

Having said that however, I am not prepared to go all the way with Counsel for the plaintiffs that the appropriate period of the notice to quit in this case should be one year. I say so because, as was rightly pointed out by Earnshaw J. in *Tay Boon Huat v. Kulsam* ( *ibid*) at p. 54 paras 6 and 7, whilst in England there is for most crops only one period of growth, that is to say, during the spring and the summer, in this part of the world we have a perpetual summer and, so far as market gardens are concerned, it is possible that many vegetables and some fruits can be grown more than once a year, if not all the year round. Even if the tenancies were regarded as tenancies from year to year, six months' notice would be sufficient to terminate a tenancy of that sort. Upon the evidence, however, I do not consider that I can infer a tenancy from year to year.

It will be recalled that the general notice by Khoo Kongsi dated 1 March 1941, (reproduced above) provides for the giving of three months notice in the event of a breach of the conditions specified therein by the owners of houses. Even if there were evidence that such a notice had been duly sent and received by owners of the houses concerned (and there was no such evidence), I fail to see how this assists the defendants bearing in mind that Cheong Au Pit and his ancestors had been in occupation of the plot concerned long before that. In any event, the stipulation of 3 months' notice does not assist the defendants.

I might as well interpolate to add, that I have not overlooked the submission of Counsel for the defendants based on the minutes P48 p. 5. These minutes purport to confirm events at a meeting of the Khoo Kongsi's board held on 18 April 1950 and show that it was the policy of Khoo Kongsi to treat tenancies of farmland as transferable subject to the intending transferee appearing before the Kongsi to confirm the rental payable. Ex D9 - a translation of excerpts from the Minutes of Board Meetings of Khoo Kongsi (1959) - appears to reinforce that view.

It is true that the minutes P48 p. 5 indicate that the tenancies of Khoo clansmen were terminable on one month's notice but these minutes relate to a meeting held on 18 April 1950, and would therefore be evidence of the general practice of Khoo Kongsi at that time only. In other words, it could not have the effect of taking away rights acquired by Cheong Au Pit long before such date.

I had visited the *locus in quo* accompanied by Counsel on both sides and bearing in mind the purpose of the lettings in this case and having given the fullest consideration to the submissions advanced by Counsel, I consider that three months notice would be reasonable for the determination of the tenancies of the farm and the two houses as this would afford the plaintiffs

sufficient time within which to harvest their crops and to yield vacant possession of the plot concerned. In this respect, I see no reason to distinguish between the farm and the houses for the reasons stated.

It follows, therefore, that the notices to quit of one month's duration issued by the Solicitors for Khoo Kongsi hereinbefore referred to, were not valid and therefore ineffective in law to determine the tenancies o f the vegetable land (the farm) and the two dwelling houses.

On this ground alone, the plaintiffs are entitled to remain in possession of the two dwelling houses and the vegetable land (the farm) and so D3's counterclaim for possession thereof must be dismissed with costs.

**As to (B) - Was DW3 authorised to instruct solicitors to issue notice to quit?**

The gist of the submission of Counsel for the plaintiff was that DW3 in instructing the Solicitors of Khoo Kongsi to issue the notice to quit had exceeded his authority and that therefore the notices to quit were invalid. In support, my attention was drawn to the following matters:

(1) DW3 had himself testified that it was the Board of Khoo Kongsi who had the authority to decide to grant or to terminate tenancies and that when this happened a record would be made of it in the form of a minute in the appropriate Minute Book.
(2) The evidence disclosed that the Board had not made a decision to terminate the tenancies of the plaintiff but that DW3 had, off his own bat, so to speak, instructed solicitors to issue the notices to quit to the plaintiffs in respect of the dwelling houses and the vegetable land (the farm).
(3) There was no provision in the joint venture agreement (ABl pp. 31-48) empowering DW. 3 to terminate the tenancies of tenants of Khoo Kongsi.

The submissions of Counsel for the plaintiffs regarding this part of the case are attractive, but it overlooks the cogent fact that assuming for the sake of argument that DW3 had exceeded his authority as alleged, there is ample evidence that, Khoo Kongsi had ratified the act of DW3 in instructing Solicitors to issue the notice to quit. This branch of Counsel for the plaintiffs' objections therefore fails.

**Was service of the notice to quit effective in law?**

It was anticipated by Counsel for the defendants that a separate objection might be taken by Counsel for the plaintiffs that the notice to quit dated 20 July 1982 having been addressed to the deceased Cheong Au Pit was for that reason invalid. In the event, however, Counsel for the plaintiff did not take the point.

However, as the point might be taken as a new point should there be an appeal from my decision. I think I should deal with it.

There is no dispute that the notices to quit had been received by the children of Cheong Au Pit who were in occupation of the farm and there is authority for saying that notices to quit are validly served if left at the premises. [See *Lim Kien Mok v. Beavan* [1963] 29 MLJ 284. When, therefore, the notice to quit was received by the occupants it was received as agents for and on behalf of the Official Administrator. [See *Teck Seng v. William Eu Keng Yuet* [1980] 2 MLJ 115; *Lai Seng Fook v. Tang Kong Low* [1978] 1 MLJ 138].

In any event, I agree with the submission of Counsel for the defendants that any defect with regard to the notice to quit dated 20 July 1982 was repaired by the second notice to quit dated 28 August 1982 which was addressed to P1 and P2 as the representatives of the Estate of Cheong Au Pit.

**Was dwelling house No. 258K subject to the Control of Rent Act 1966?**

It was contended by Counsel for the plaintiffs that as the dwelling house 258K had been completed by Cheong Au Pit prior to 31 January 1948, it was subject to the Control of Rent Act 1966.

But can a ground tenant be a protected tenant having regard to *Mok Deng Chee v. Yap See Hooi* [1981] 2 MLJ 321,323 1 and *Muniandy v. Muhammad Abdul Kadir* [1989] 2 MLJ 416, 417 E-F.

I agree with Counsel for plaintiff that the passages relied on by Counsel for the defenants in the above mentioned cases, are *obiter dicta* and contrary to the *ratio decidendi* of Ong J. (as he then was) in *Nair v. Chidambaram* [1961] 27 MLJ 264, which was not cited to or by the Court in *Mok Deng Chee and Muniandy*.

The defendants did not attempt to satisfy the requirements of s. 16(1) of the Control of Rent Act 1966, and so, this Court has no jurisdiction to make an order for possession in respect of dwelling house No. 258K.

In any event, therefore, the defendants' claim for possession of the dwelling house 258K must, on this ground alone, be dismissed.

**As to Issue 3 - Did there arise in the plaintiffs' favour an equity or equitable estoppel protecting their occupation of the plot concerned?**

If I am wrong in the view I take regarding issue 2, the next question I have to consider is whether the plaintiffs' occupation of the plot concerned is protected by an equity or equitable estoppel?

It will be recalled that the case for the plaintiffs regarding this issue had already been outlined earlier on in this judgment; any repetition would be tedious and unnecessary. So, without further ado, I shall proceed to make certain essential findings pertinent to this part of the case.

I am satisfied, upon the evidence before me, that the alleged promises or assurances had been made by Khoo Kongsi first, to Cheong Au Pit, these promises or assurance being that so long as he continued to pay ground rent he could stay and cultivate the vegetable land as long as he wanted, that Cheong Au Pit told his daughter P2 of the same and, relying on the same he and his family had converted what was once a swampy jungle land into a productive farm. He also built dwelling house No. 258K on the vegetable land and this I accept was in existence even before 15 December 1938 - that being the date of birth of P2. In addition, in 1963, Cheong Au Pit also built dwelling house 258H on the vegetable land with the consent of Khoo Kongsi and had it registered in the records of Khoo Kongsi in the name of P2.

In my opinion, Cheong Au Pit would hardly have done these acts which involved unusual exertion and considerable expense unless those promises and assurances had in fact been made. Similarly, I accept the testimony of P2 that after the death of Cheong Au Pit in 1963, she spent RM1, 500 in providing for dwelling house 259H.

I also accept the testimony of P2 that sometime in 1972, the visiting trustee of Khoo Kongsi had told P2 that it was not necessary to change the tenancy of the vegetable land into her name and that she could continue planting vegetables as long as she wished provided she paid rent and that relying upon this assurance, the plaintiffs had invested money in installing a sprinkler system. In my opinion, the plaintiffs would hardly have incurred such substantial expenditure unless the visiting trustee had given the promise or assurance. Certainly, they would not have done so if they thought that all they had was a monthly tenancy terminable on just one month's notice.

Quite apart from the conduct of Cheong Au Pit and the plaintiffs following the promises and assurances given by Khoo Kongsi to which I have just adverted, there was also other evidence which was wholly consistent with these promises or assurances having been made. I refer to the testimony of Khoo Kah Seng (DW3) a trustee of Khoo Kongsi who when asked what Khoo Kongsi would do when a tenant of vegetable land dies, replied "The tenancy will continue for the benefit of the family". And when the matter was probed further, and he was asked:

> Q. So long as they continued to pay rents, they can continue farming?

he replied:

> A. Yes.

Having regard to the evidence of Khoo Kah Seng himself, regarding the practice of Khoo Kongsi when a tenant of vegetable land died, there is thus no escape from the conclusion that the tenancies held by Cheong Au Pit of Khoo Kongsi was not just for his benefit but also for the benefit of his family, and that these tenancies could not have been mere monthly tenancies.

I therefore have no hesitation in agreeing with the submission of Counsel for the plaintiffs that the trustees of Khoo Kongsi must have been fully aware of the social cultural context upon which their legal relationship with Cheong Au Pit was based. In other words, they must have known that Cheong Au Pit was the head of an extended Chinese family and the farming activities carried on were for the benefit of this extended family.

In arriving at my conclusion regarding this part of the case I have given the fullest consideration to the careful submissions of Counsel for the defendants but I regret I am unable to accede to them for reasons I shall now state.

First of all, it was submitted by Counsel for the defendants that the evidence of P2 of

statements made to her by Cheong Au Pit regarding the promises or assurances made by Khoo Kongsi, was hearsay and inadmissible.

Similarly, it was contended that evidence of P2 regarding the promises or assurances made to her by the visiting trustee suffered from the same defect.

I regret I cannot agree. It is well established that such evidence is not hearsay and is admissible when it is proposed to establish by the evidence, not the truth of the statement but the fact that it was made. *[Subramaniam v. PP]* [1956] MLJ 220.

As the Privy Council pointed out in *Subramaniam's* case, the fact that a statement was made, quite apart from its truth, is frequently relevant in considering the mental state and conduct thereafter of the witness.

In the present case, the plaintiffs' case was that it was because Cheong Au Pit believed the promises or assurances (whether genuine or not) by Khoo Kongsi, that he was induced to engage in his farming and construction activities. And, similarly, it was because P2 believed the promises or assurances (whether genuine or not) of the visiting trustee that she and the other plaintiffs were induced to continue with the farming activities and to expend a substantial sum of money in the installation of a sprinkler system. Therefore, evidence of the promises or assurances concerned had been adduced not to prove that these promises or assurances were true in the sense that Khoo Kongsi intended to keep those promises or to live up to those assurances, but for the purpose of showing that it was by reason of those promises or assurances that Cheong Au Pit and the plaintiffs had been induced to act in the manner aforesaid to their detriment.

Secondly, it was submitted by Counsel for the defendants that the evidence of P2 as to the promises or assurances by an unidentified person said to be the visiting trustee or supervisor of Khoo Kongsi in 1972, was in any event inadmissible because Khoo Kongsi was not a party to these proceedings.

I think that this submission overlooks s. 18 (3) (a) and (b) of the Evidence Act (Revised -1974) which reads as follows:

Section 18(3) Statements made by:

(a) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested; or

(b) persons from whom the parties to the suit have derived the interest in the subject-matter of the suit,

are admissions if they are made during the continuance of the interest of the persons making the statements.

The facts relevant to this part of the case show clearly that the developer D3 had become the registered lessee of Lot 2523 where on the plot concerned is situated. That lease was executed by the Trustees of Khoo Kongsi as registered proprietors in favour of D3, pursuant to clause 16 of the joint venture agreement (AB1 p. 40) to which they were parties, for the purpose of proceeding with the development on the said lot. By the joint venture agreement D3 had undertaken to complete the entire scheme within 8 years from the date of approval of the building plans whilst the trustees of Khoo Kongsi had also undertaken to execute a 99 year lease in favour of purchasers of plots of land with buildings thereon in the housing scheme upon issue of separate titles thereto.

In these circumstances, it was unmistakbly clear that D3's lease is held in trust and for the benefit of Khoo Kongsi and itself for the purpose of proceeding with the development.

It follows that D3 derive their interest in the subject matter of the suit from the trustees of Khoo Kongsi and so statements made by visiting trustees or supervisors of Khoo Kongsi which are admissions during the continuance of that interest are admissible under s. 18(3)(a) and (b) even though technically the trustees of Khoo Kongsi are not parties to this suit.

I further find that in all probability that the person who made the promises or assurances was in fact the visiting trustee and supervisor of Khoo Kongsi. There is no reason to suppose that that person did not hold the office he purported to hold for who else would be making such promises or assurances. And, it is significant that the defendants did not call whoever it was who held the office of visiting trustee at the material time to contradict the testimony of P2 and PW1.

Thirdly, it was submitted that promises or assurances made by a visiting trustee would not be binding on Khoo Kongsi because according to the affidavit evidence of a trustee, Khoo Peng

Tee (pp 64 - 68 BA (1)) and DW3, he had no power to make the same.

In answer to this submission, Counsel for the plaintiffs relied on the doctrine of apparent (sometimes called ostensible) authority under which, a principal may be bound by the acts of an agent which he has not authorised and has even forbidden.

In particular, he pointed out that Khoo Kongsi had held out the visiting trustee as having power to deal with their tenants on their behalf

It will be recalled that both P2 and PW1 had testified that they had made a request to the visiting trustee for the transfer of the tenancy of dwelling house 258K and the vegeable land to P1 and P2 and that as a result, on his next visit, he had brought a letter for P1 and P2 to sign; this was done, and later that dwelling house was registered in the name of P1 and P2.

The doctrine of "holding out", sometimes called apparent or ostensible authority, has been said to be based upon estoppel. [See *Rama Corp. Ltd. v Proved Tin and General Investments Ltd.* [1952] 2 QB 147, 149, 150. *Freeman v. Lockyer (a firm) Buckhurst Park Properties (Mangal) Ltd* [1964] 2 QB 480 at 498, 502-506. Agency by estoppel arises where one person has so acted - and this he may do by allowing the agent to hold himself out as having authority [see e.g. *Re Henry Bentley & Co and Yorkshire Breweries Ltd ex parte Harrison* [1893] 69 LT 204 CA; *Ashfordhire Council v. Depen Motors Ltd*. [1961] AC 336 - as to lead another to believe that he has authorised a third person to act on his behalf, and that other, in such belief, enters into transactions with the third persons within the scope of his ostensible authority. The onus rests on the person dealing with the agent to establish real or ostensible authority (*Pole v. Leask* [1863] LJ Ch 155). The conduct said to amount to holding out must be proved affirmatively. (*Bailey & Whites Ltd v. House* [1915] 31 TLR 583). It is a question of fact in a particular case whether ostensible authority existed for the particular act in respect of which liability is sought to be imposed upon the principal. (*Brazier v. Camp* [1894] 63 LJ QB 257 CA).

In *Crabb v. Arun* [1975] 3 AER 865, at p. 875, Lord Scarman dealt with the approach of equity when the question of the authority of an agent to bind his principal arises for consideration. What he said was this:

> Nor do I think it necessary in a case such as this to enquire minutely into the law of agency. These defendants could, of course, only act through agents, but, as I have already made clear, from the very nature of the case, there would be no question of grant, no question of legally enforceable contract. We are in the realm of equity; and within that realm we find that equity, to its eternal credit, has developed an immensely flexible, yet perfectly clear, doctrine: see *E R Ives Investments Ltd v. High* per Danckwerts L J. The approach of equity, when there is a question of agency in a field such as this, must I think be a very simple one. It will merely be that, within reasonable limits, those to whom a defendant entrusts the conduct of negotiations must be treated as having the authority, which, within the course of the negotiations, they purport to exercise it.

Applying the principles enunciated in the above authorities I am satisfied, having regard to the evidence, that the plantiffs have succeeded in proving on the balance of probabilities that the visiting trustee was held out as having power to deal with the tenants on its behalf, including the power to make the promises and assurances aforesaid upon which the plaintiffs had relied and incurred substantial expenditure by the installation of a sprinkler system on the farm. They would hardly have done so if they were liable to be turned out by a mere one month notice to quit.

Fourthly, I should like to consider the submission of Counsel for the defendants that the alleged promises or assurances relied upon by the plaintiffs that they could continue and stay on the plot concerned as long as they like or forever so long as they paid rent even, if true, would invalidate the tenancy because as he puts it:

> 'A tenancy like all contracts requires certainy of terms. The term alleged by the plaintiffs renders the duration of the tenancy uncertain and therefore invalid.' [*Karuppan Chetty v. Suan Thian* [1916] 1 FMSLR 300 CA and *Prudential Assurance Co. Ltd. v. London Residuary Body Ors.* [1992] 3 WLR 279.

This branch of Counsel's submission is directly related to another branch of his submissions which raises the question whether the availability of the alleged equity depends upon the availabillty of the remedy of specific performance and, so, for the sake clarity and convenience, I propose to deal with it under that sub-heading which follows immediately hereunder.

**Does the availability of the alleged equity depend on the availability of the remedy of specific performance?**

"Yes" said Counsel for the defendants and he relied on the following passage in the judgment of H. T. Ong CJ in *Yong Tong Hong v. Siew Soon Wah & Ors. (ibid)* at 107 col 1 F:

> In the instant case the landlord's claim to re-possession is met by a counterclaim for specific performance. As Vaughan Williams LJ said in *Zimbler v. Abrahams* [1903] 1 KB 577:
>
> > If the defendant is entitled to specific performance, it follows he is not liable to be ejected.

Similarly, he pointed out that when *Yong Tong Hong's* [1973] 1 MLJ 133 case went on appeal to the Privy Council, Viscount Dilhorne posed the question:

> Is the respondent (the tenant) entitled to specific performance of that agreement? [1973] 1 MLJ 133, at 135 col 2 para I last sentence.

Counsel rounded off this part of his submissions stressing that here the plaintiffs were not entitled to specific performance, presumably because the oral agreement relied upon by them following the promises or assurances aforesaid, was bad for uncertainty, and moreover that the plaintiffs had not even counterclaimed for specific performance.

In their excellent work on **Equity Doctrines and Remedies,** 3rd Edn. [1992] at p. 433 para 1728 Meagher, Gummow and Lehane, have an interesting commentary on the case of *Siew Soon Wah v. Yong Tong Hong (ibid*). What they say is this:

> As the law stands, even within the rubric of estoppel, there is scope for considerable confusion.
>
> The Privy Council decision in *Siew Soon Wah v. Yong Tong Hong* is a striking example. There the father of the plaintiffs alledgedly agreed to let certain premises to the defendant in consideration not only of rent but also of a lump sum payment. The reversion was then transferred to the plaintiffs (whether for value and with notice does not appear clearly from the report on appeal or below [1971] 2 MLJ p. 105 at 108) and they sought to eject the defendant; he counter-claimed for specific performance. The first issue was to determine whether there was any lease and whether it had properly been determined. The Privy Council, in finding for the defendant, held (a) the arrangement was not so vague and uncertain as to be void for uncertainty; (b) although there was no registrable instrument as required by the relevant legislation, the defendant had a counter- claim for specific performance which was a good answer to the claim of the plaintiffs: *Zimbler v. Abrahams* (*ibid*). That would appear quite sufficient to dispose of the case. But, Viscount Dilhorne for the Privy Council then went on [1973] AC at 845) to cite *Inwards v. Baker ( ibid*), and to restate his conclusion as that "there rose in the (defendant's) favour an equity or equitable estoppel protecting his occupation ..." because the defendant had paid the lump sum and rent thereafter in accordance with his alleged lease. This holding, as appears from the above, was unnecessary for the conclusion, and productive of confusion. For it has always been assumed that performance of contractual obligations cannot amount to self-detrimental conduct induced by the other party and thus raising an estoppel against him. The truth of the matter is that estoppel would have been relevant in this case only if their lordship had held the arrangement void at law for uncertainty so that there was no agreement of which specific performance might be decreed. Granted there was such agreement, to add estoppel as a ground for decision is to supply a third wheel to the chariot.

It is difficult to find fault with the learned author's comments and I would respectfully concur in their view that the Privy Council having found that the arrangement relied on by the tenant was not so vague and uncertain as to be void for uncertainty and although there was no registrable instrument for purposes of the National Land Code or its predecessor the Land Code (Cap 138) the tenant had conterclaimed and so this was a sufficient answer to the landlords claim for possession. Obviously, these findings were all that was required for the decision in favour of the tenant. Therefore, in going further and adding estoppel as a further ground for the decision their Lordships, and in the Court below the Federal Court, were really supplying "a third wheel to the chariot". This would appear to have been unnecessary and so whatever was said on estoppel would be *obiter*.

Be that as it may, Counsel for plaintiffs has pointed out that unlike *Siew Soon Wah's* case where the Court was asked to consider the validity of an agreement which was not registrable under the National Land Code, in the

present case, the court is not being asked to consider the validity of any agreement but the validity of a promise made by the visiting trustee of Khoo Kongsi which led to detrimental reliance on it by the plaintiffs. In other words, it was said that the defendants had failed to distinguish between the principles governing promissory estoppel and the law of landlord and tenant.

With these submissions of Counsel for the plaintiff I agree.

The argument that the principle of promissory estoppel enunciated in *Central London Property Trust v. High Trees House Ltd.* [1947] KB 130 should be confined to cases where the parties are contractually bound to one another, recieved short shrift in *Evenden v. Guildford Football Club* [1975] I QB 917. In that case, a groundsman was employed at the football ground at Guildford. For some years he was employed by the Supporters' Club. Then he was transferred to the Football Club itself. The Football Club promised him that he would not suffer by the transfer. The question for decision was whether that promise was binding so as to entitle him to redundancy pay for the whole period? It was held that it was binding. Lord Denning said this:

> ... Promissory estoppel ... applies whenever a representation is made whether of fact or law, present or future, which is intended to be binding, intended to induce a person to act upon it and he does act upon it. That is the case here. Mr. Evenden entered into his employment with the Football Club on the faith of the representation that he would not be prejudiced and that his employment should be regarded as a continuous employment. Acting upon it, he has lost any rights against the Supporters' Club. The Football Club cannot be allowed to go back on it. His employment is to be treated as continuous for the whole 19 years. He is entitled to the full redundancy payment of 459.

I recognise, however, that the doctrine of promissory estoppel provides a defence to an action on the original contract for a defendant relying on a voluntary variation. It does not provide a cause of action for a plaintiff relying on a gratuitous promise, [*Combe v. Combe* [1951] 2 KB 215.

Yet, its effect may be to enable a party to enforce a cause of action which, without the estoppel would not exist [see *Amalgamated Investment & Property Co. Ltd. v. Texas Commerce Bank* [1982] QB 84 at 105 in CA *ibid* at 131, 132]; for example, by giving rise to a binding obligation where none existed before (*ibid* at p. 107). However, a promissory estoppel is not permanent in its effect. The case of *Ajayi v. R.T. Briscoe (Nigeria) Ltd.* [1964] 1 WLR 1326 at 1330 shows that a promissor may resile from his position upon giving the promisee notice - not necessarily formal notice - thus affording latter a reasonable opportunity of resuming his previous position; and only if that is impossible does the promise become final and irrevocable. (See *Ajayi v. R.T. Briscoe ibid* at 1330). Donaldson, J. (as he then was) applied the principle of promissory estoppel in *Durham Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd* [1968] 2 QB 839; he said at 847:

> Lord Cairns in his enunciation of the principle [in *Hughes v. Metropolitan Railway Co.* [1877] 2 App. Cas. 439, 448] assumed a pre-existing contractual relationship between the parties, but this does not seem to me essential provided that there is a pre-existing legal relationship which could in certain circumstances give rise to liabilities and penalties.

Evershed MR in an article entitled "Equity after Fusion: Federal or Confederate", [1948] I Journal of the Society of Public Teachers of Law, 171,176 observed of the *High Trees* case that

> It would appear to have established a right to the extent, but only to the extent, of a right to a specific remedy; namely, the remedy of an injunction to prevent the other party recalling his promise.

In the present case, D3 has counterclaimed for possession of the plot concerned to which the plaintiffs have replied alleging that their possession is protected by an equity or equitable estoppel and they have also prayed for an injunction restraining the defendants from carrying out work thereon.

The present case is really one where the plaintiffs and their forbears have been in possession of the plot concerned for decades and they have commenced these proceedings to protect their rights to remain in possession relying on equity or equitable estoppel. If they succeed in their plea, then what the Court will have to consider is the extent of the equity and how best to satisfy it.

In the circumstances, the answer to the question posed above regarding this part of the case

is that the plaintiffs' claim to the alleged equity does not depend on the availability of the remedy of specific performance.

**Were the plaintiffs' tenancies binding on D1 and/or D3?**

It was submitted by Counsel for the defendants that the tenancies were not binding upon D1 and/or D3 on three separate grounds: namely,

(1) neither D1 nor D3 took over the tenancies;
(2) there was no attornment either by the demand or the acceptance of the rent from the plaintiffs; and
(3) the concept of privity of estate does not apply in this country by reason of s. 6 of the Civil Law Act 1956, as privity of estate is part of land tenure.

It was argued that the rule in *Errington v. Errington & Woods* [1952] 1 KB 290, 299 that "neither the licensor nor anyone who claims through him can disregard the contract except a purchaser for value without notice" had since been repudiated in England in *Ashburn Ansalt v. Arnold* [1988] 2 AER 159.

Similarly, it was pointed out that *Lyus v. Prowsa Developments Ltd.*[1982] 2 AER 953 was disapproved.

It was further argued that in the case of D3, a further consideration was its position as registered lessee under the lease dated 10 August 1983 (AB2). It was emphasised that the protection as indefeasibility applied also to registered lessees unders s. 340(1) of the National Land Code and that the plaintiffs had not brought themselves within any of the exceptions to the indefeasibility rule such as fraud within the meaning of the authorities discussed by me in the case of *Goh Hooi Hin v. Lim Teong Ghee & Ors.* [1990] 3 MLJ 23 at 32;. in particular, the folowing passage in my judgment in that case was cited:

> ... there is no fraud on the part of the registered proprietor in merely acquiring title with notice of an existing unregistered interest or in taking a transfer with knowledge that its registration will defeat such an interest. (at p 32).

It was next submitted that although fraud had not been alleged in the pleadings, P2 had in her affidavit dated 7 June 1990 [BA (1) pp 161-173] filed in opposition to D3's summons to vary the injunction made allegations of fraud and dishonesty, but that these allegations, even if true, did not constitute fraud in the sense sufficient to upset the title of a registered proprietor. More particularly, the allegations were these:

> (f) The 3rd defendant and the Khoo Kongsi are partners in a joint venture agreement and it would be fraudulent, dishonest and reprehensible on the part of the 3rd defendant to attempt to use the principle of indefeasible interests under the National Land Code to defeat the vested rights of the plaintiffs.
> (g) Hence by reason of the aforesaid, at all material times, when the 3rd defendant embarked on their joint-venture housing development, they had full knowledge of the plaintiffs' legal and equitable rights to the said land and cannot therefore pray in aid the doctrine of the *bona fide* purchases for value without notice (p. 165 of BA (1)).

Futhermore, my attention was drawn to the plaintiffs' defence to D3's counterclaim and, in particular, that it had not alleged fraud but had by para 4 thereof instead alleged that D3 was not a *bona fide* purchaser for value without notice. This, it was said, fell far short of the requirements for upsetting the title of a registered proprietor and this would include a registered lessee like D3.

In order to determine whether the submissions of Counsel for the defendants regarding this part of the case are tenable, it is necessary to keep in the forefront of our minds the background facts as to how the defendants in this case came into the picture. These facts, as to which there is no dispute, may for convenience, be taken in substance, from the written submissions of Counsel for the plaintiffs and are as follows:

In was pursuant to clause 16 of the Joint Venture Agreement (AB1, p.40) that D3 became the registered lessee of Lot 2532 on 24 August 1983, whereon the plot concerned is located. The object of this exercise, according to a director of D3 in charge of the building work on the scheme, Ng Bock Tye (DW4), was to facilitate the development works thereon. This was understandable since Khoo Kongsi was contractually bound to execute a 99 year lease in favour of purchasers of plots of land whereon dwelling houses were to be erected and similarly, D3 was by clause 12, also contractually bound to complete the entire building scheme within 8 years from date of approval of thereof.

In these circumstances, the irresistible inference is that D3's lease is held in trust for the

benefit of Khoo Kongsi and D3 for the purpose of facilitating development of the project

By the same token, it may be said, that D3 is for purposes of the development, the alter ego of Khoo Kongsi. It follows that D3 would be in no better position to resist the plaintiffs claim to be entitled to be in possession in law and equity than would Khoo Kongsi itself.

On a further ground also the plaintiffs' equity would bind D1 and D3. D1 and D3 are admittedly sister companies of the Farlim Group, directly concerned in the development of the Thean Teik Estate, the property of Khoo Kongsi and it is not insignificant, that a trustee of Khoo Kongsi, Khoo Kah Seng (DW3) is a director of both D1 and D3. Since the institution of this suit in 1982, and the plaintiffs application for interlocutory injunctive relief, D1 and D3 have had notice of the plaintiffs' interest as this received considerable treatment in the pleadings and the affidavits. As successors in title with notice of the plaintiffs' interest in the plot concerned, D3 would have to take its lease subject to that interest. (See *Mok Deng Chee v. Yap See Hoi & Ors. (ibid); Devi v. Francis* [1969] 2 MLJ 169. The validity of contracts relating to land **or any interest therein** is explicitly declared in s. 206(3) of the National land Code. [Per H.T. Ong CJ in *Yong Tong Hong v. Siew Soon Wah & Ors. (ibid)* at 108 col 1G]. The position would be a *fortiori* having regard to my finding that D3 held the registered lease as alter ego of Khoo Kongsi.

I regret, therefore, that I am unable to accede to the interesting submissions of Counsel for the defendants that the protection of indefeasibility guaranteed under s. 340(1) of the National Land Code enables D3 to take its lease free of the plantiffs' interest in the plot concerned.

**Proprietary Estoppel**

This brings me to a consideration of the submission advanced on behalf of the plaintiffs that they are entitled to rely upon the plea of proprietary estoppel.

Proprietary estoppel is one of the exceptions to the general rule that a person who spends money on improving the property of another has no right to claim reimbursement or any proprietary interest in property [See eg. *Ahmad Yar Khan v. Secretary of State for India in Council]* [1901] LR 28 Ind. App. 211. Unlike promissory estoppel, proprietary estoppel when it operates is permanent in its effect and it is also capable of operating positively so as to give a cause of action. [See *Denny v. Jensen* [1977] 1 NZLR 635].

In *Ramsden v. Dyson* [1866] 1 LR 129 estoppel by representation was considered in relation to cases in which a person builds on the land of another, the landowner standing by without asserting his rights. In his dissenting judgment, which is still considered the *locus classicus* on the subject, *Lord Kingsdown* said this:

> If a man, under a verbal agreement with a landlord for a certain interest in land, or, what amounts to the same thing, under an expectation created or encouraged by the landlord that he shall have a certain interest, takes possession of such land with the consent of the landlord, and upon the faith of such promise or expectation, with the knowledge of the landlord and without objection by him, lays out money upon the land, the court of equity will compel the landlord to give effect to such promise or expectation.

It was argued by Counsel for the defendants on the authority of *Brinnand v. Ewens* [1987] Ch. 2 EGLR 67 that for this sort of estoppel, four conditions have to be met:

(1) the claimant must have incurred expenditure or otherwise acted to his detriment;
(2 ) the claimants must have acted in the belief that they either owned or would obtain a sufficient interest in the property to justify the expenditure;
(3) the claimants belief must have been encouraged by the landlord; and
(4) there must be no bar to the equity such as the contravention of any statute.

It will be recalled that the plaintiffs' claim to a proprietary estoppel is based on the expenditure of money by Cheong Au Pit on Khoo Kongsi's land in the expectation or belief encouraged by Khoo Kongsi that they could stay on the land and carry out their farming activities as long as they wished provided that they paid the rent.

Having regard to the facts relied upon by the plaintiff upon which they based their claim to proprietary estoppel, Counsel for the defendants contended that such a claim was untenable because, to quote his written submission:

> there is no basis for a proprietary estoppel or equity since

(a) the plaintiffs had made no mistake as to the title of the land; the deceased was a ground tenant and the plaintiffs were aware of the ownership of the land in Khoo Kongsi: a mistake by the representee (known to the owner) and acquiescence in that mistake by the owner are essential; these are lacking in the present case; the promise must be supported by independent consideration apart from the obligation to pay rent; there is no evidence in this case of any such independent consideration, the decisive factor in the other cases in which the doctrine had been applied (usually by the payment of premium or "teamoney");

See *Tan Khien Toong & Ors. v. Hoong Bee & Co* [1987] 1 MLJ 387 (SC); *Siew Soon Wah v. Yong Siew Tong (ibid*) (PC) affg [1971] 2 MLJ 105 (FC); *Lee Lum Soh v. Low Ngah*[1973] 1 MLJ 97.

In *Siew Soon Wah*, *supra* Viscount Dilhorne adverted to this fact, with reference to the payment of the sum of RM8,000 in that case:

In this case the respondent occupied the ground floor since February 1958 and paid rent therefor. In February 1958 he paid the sum of RM8,000 to his landlord. He cannot have done that for a tenancy of short duration. It must have been paid in consideration of the tenancy described in the agreement of June 1964 (*Ibid*. 135 Right C-D).

(b) The allegation of estoppel is not founded on what the deceased did but on what the plaintiffs did after the death of Cheong Au Pit; there must be reliance and detriment based on an inducement or encouragement by Khoo Kongsi:

*Imperial Bank of Canada v. Mary Victoria* AIR [1936] PC 193.

As to encouragement and expenditure see *Siew Soon Wah v. Yong Siew Tong ibid* at 134I to 135A left and *Khew Ah Bah v. Hong Ah Mye* [1971] 2 MLJ 88; *Mok Deng Cbee v. Yap See Hoi (ibid).*

I regret I cannot agree with the submission of Counsel for the defendants that to establish proprietary estoppel, in cases where a person builds on or improves land of another, the landowner standing by without asserting his rights while this is going on, it is essential to prove that such a person mistakenly thought that the land was his own when he did those acts, though I accept that in such a case, equity will treat the true owner's conduct as estopping him from subsequently asserting his title to the detriment of such person. I say so because even if such a person builds or improves land of another knowing he was doing so on land belonging to another, there will still arise an equity in him if the landowner led such person to expect to be allowed to stay there. The case usually cited for this proposition is *Inwards v. Baker ( ibid)* at pp. 36-37 where a father owned land and invited his son to build a bungalow on it. This was done partly at the son's expense, and the son lived in the bungalow. When the father died the title to the land passed, under a will made before the land was bought or the bungalow built, to the father's mistress and other children.

The Court of Appeal held that the son had a right to remain. Lord Denning MR, speaking for the Court said:

> ... if the owner of land requests another, or indeed allows another to expend money on the land under an expectation created or encouraged by the landlord that he will be able to remain there, that raises an equity in the licensee such as to entitle him to stay. He has a licence coupled with an equity. ...even though there is no binding contract to grant any particular interest to the licensee nevertheless the court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of being allowed to stay there. If so, the court will not allow that expectation to be defeated where it would be inequitable to do so ... I think that any purchaser who took with notice would clearly be bound by the equity.

*Inwards v. Baker* was a case of active encouragement since the father there had persuaded his son to build the bungalow on the father's land but an equity will also arise where the landowner merely encourages the builder's belief passively, as where the mortgagee stood silently by while a purchaser in ignorance of the mortgage built on the land. [See *Attorney-General of Hong Kong v. Phreys Estate* (Queen's Gardens) Ltd [1987] AC 114; *Haslemere Estates Ltd v. Baker* [1982] 1 WLR 1109, at 1119 "The circumstances of looking on is in many cases as strong as using terms of encouragement". [Per Lord Eldon in *Dann v. Spurie*r [1802] 7 Ves. 231, at 236].

I note that in both *Mok Deng Chee v. Yap See Hoi & Ors. (ibid)* Salleh Abas FJ (as he then was) speaking for the Federal Court, and Choor Singh, J in the Singapore case of *Khew Ah Bah v. Hong Ah Mye (ibid*) applied the principle in *Inwards v. Baker (ibid)* although in neither case was there any question of mistake. And, in *Siew Soon Wah v. Yong Tong Hong* (*ibid*) Viscount Dilhorne quoted with approval the following passage in the judgment of Lord Denning in *Inwards v. Baker*, "All that is necessary is that the licensee should, at the request or with the encouragement of the landlord, have spent the money in the expectation of having been allowed to stay there.

Nor, for that matter am I persuaded by Counsel for the defendants that an independent consideration; for example, the payment of tea money over and above the rent is an essential requirement for the operation of the doctrine of proprietary estoppel. The case to which I should like to refer here is *Crabb v. Arun District* Council *ibid* at p. 179 where Lord Denning speaking for the Court of Appeal said this:

> ... Short of a binding contract, if he makes a promise that he will not insist on his strict legal rights - then **even though that promise may be unenforceable in point of law for want of consideration** or want of writing and, if he makes the promise knowing or intending that the other will act on it, and he does act on it, then again a court of equity will not allow him to go back on that promise. Short of an actual promise, if by his words or conduct, so behave as to lead another to believe that he will not insist on his strict legal rights knowing or intending that the other will act on that - belief and he does so act, that again will raise an equity in favour of the other and it is for a court of equity to say in what way they may be satisfied. The cases show that this equity does not depend on agreement but on words or conduct ...
> (Emphasis supplied).

Similarly, I am not persuaded that to raise an equity, it is essential that the representator must have knowledge that his property is being improved. The representator's conduct and the subsequent action and belief of the representee may render it unconscionable for the representator to insist on his strict legal rights. I am supported in this by the following passage in the judgment of Oliver J. in *Taylor Fashions Ltd. v. Liverpool Victoria Trustees Co.* [1981] 1 AER 897.

> Furthermore, the more recent cases indicate, in my judgment, that the application of the *Ramsden v. Dyson* principle (whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial) requires a very much broader approach which is directed to ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly or unknowingly, he has allowed or encouraged another to assume to his detriment rather than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.

In this context, the case of *Shaw v. Applegate* [1977] 1 WLR 970 at 970 or 977, 978 merits reading.

**Proprietary Estoppel compared with Constructive Trust**

I might as well add that the principles of estoppel have on various occasions been compounded with those governing constructive trusts. [See e.g. *Grant v. Edwards* [1986] Ch D 638 at 657, *Gillies v. Keogh* [1989] 21 NZLR 327 at 330; *Lloyds Bank plc v. Rosset* [1991] 1 AC 107 at 132].

Indeed, the princples which apply to constructive trusts are closely akin to those underlying the doctrine of proprietary estoppel. In both, the claimant must have acted to his detriment in reliance on the belief that he would obtain an interest. [See *Grant v. Edwards (ibid), Lloyds Bank v. Rosset* [1990] 2 WLR 867 at 877]. In both, equity acts on the conscience of the legal owner to prevent him from defeating the common intention. [See *Grant v. Edwards at- 656*; *Maharaj v. Chand* [1986] AC 898 at 907, 908; *Re Basham* [1986] 1498 at 1504].

I therefore hold that in some cases - and the plaintiffs' case is such a case - proprietary estoppel is a form of constructive trust. [See *Re Bashan (dec'd)* [1987] 1 AER 405 at 410].

This is yet another ground for not acceding to the submission of Counsel for the defendants regarding this part of the case.

**What is the extent of the equity which arises in favour of the plaintiffs?**

Having found that the plaintiffs' occupation of the plot concerned is protected by an equity the

next question for decision is what is the extent of that equity? The cases of *Griffiths v. Williams* [1977] 248 EG 947, 949 and *Jones (A.E.) v. Jones (F.W)* [1977] 1 WLR 438 at 443, indicate that the extent of the equity is to have made good, so far as may fairly be done between the parties, the expectations of A which O has encouraged. The maximum extent of the equity being A's expectation or belief. (See *Dodsworth v. Dodsworth* [1973] 228. EG 1115 at 1115, 1117.

In the present case, the interests of third party purchasers must be taken into account. As Denning MR put it in *Crabb v. Arun DC (ibid)* at p 189, in its search for the "minimum equity to do justice" to A and shaping it to the facts of the case, "equity is displayed at its most flexible". Or, as the Privy Council put it in *Plimer v. Wellington Corporation* [1884] 9 App Cas 699

> ... the court must look at the circumstances in each case to decide in what way the equity can be satisfied.

**How is the equity to be satisfied or, in other words, what are the remedies available?**

The reports show a wide variety solutions reached in cases in which a person has expended money on the property of another.

In *Inwards v. Baker (supra)* it will be recalled that the Court of Appeal held that despite the legal title being in the plaintiffs, the son had an equity to remain in the bungalow "as long as he desired to use it as his home". Dankwerts LJ observed "equity protects him so that an injustice may not be perpetrated". In *ER Ives Investment Ltd v. High* [1967] 2 QB 379 the Court held that Mr. High and his successors had an equity which could only be satisfied by allowing him to have a right of access over the yard, "so long as the block of flats had its foundations on his land". Accordingly, the plaintiffs were refused an injunction to restrain the defendant from exercising a right of way across the former's land.

In *Siew Soon Wah & Ors. v. Yong Tong Hong (ibid*) the Privy Council held that there was an equity or an equitable estoppel protecting the defendant in his occupation for 30 years.

In *Bank Negara Indonesia v Hoalim* [1973] 2 MLJ 3, we see the Privy Council holding that notwithstanding the fact that the defendant had no protection under the Rent Act, he had an equity to remain "so long as he continued to practise his profession."

In other cases, the Court may give relief to the person who has incurred the expenditure on another's land by giving him an equitable lien on the property for his expenditure [see *Raffaele v. Raffaele* [1962] WAR 238 discussed by E.E. Allan [1963] 79 LQR 238] or for the value of his improvements [See *Neesom v. Clarkson* [1845] 4 Hare 97], in which event he will be treated as a mortgagee in possession. (See *Neesom v. Clarkson* (*ibid)*].

However, the Court has been known to make an order for possession against the person who has made the improvements conditional upon the landowner repaying the cost of those improvements. [*Dodsworth v. Dodworth (ibid)*].

On the other hand, if the evidence shows that the prejudice suffered by the person who made the improvements, has been fully satisfied or, in other words, that he already has "sufficient satisfaction" for his expenditure, he will obtain no further relief. (See *Att. Gen v. Balliol College Oxford* [1774] 9 mod 407 at 412 (expenditure by lessees).

In the present case, on the extent of the equity, Counsel for the plaintiffs refocussed the attention of this Court on the following:

During his life time, and just before his death, Cheong Au Pit had given house No. 258K to P1 and P2 and the vegetable land to the plaintiffs and PW1. Thus, Cheong Au Pit's equity in house 258K devolved upon P1 and P2 and his equity in the vegetable land upon the plaintiffs and PW1. Subsequently, in 1972, Khoo Kongsi had represented to P2 that she could stay on the plot concerned and continue farming as long as she wished provided she paid rent. It was said that this representation amounted to a tenancy for as long as the law would permit.

This last point has no doubt been inspired by the judgment of H.T. Ong, CJ, speaking for the Federal Court, in *Yong Tong Hong v. Siew Soon Wah ibid* at p. 58 where, a question arose as to what effect should be given to a clause in a tenancy agreement - not a proper instrument for registration as a lease under the National Land Code - the clause being "the tenancy shall be permanent" or, in the words which fell to be decided by the trial Judge, "for so long as the tenant wished to occupy" no distinction being drawn between these words and the clause concerned, Ong, CJ then concluded (at p. 108 col 1 para F, G) that no strain would be imposed

upon the powers of the Court to to give effect to tbe expressed intention of the parties by holding that the agreement was one for the grant of as long a lease as the law allows which by s. 221(3)(b) of the National Land Code, in the case of a lease of part only of alienated land was, 30 years. His judgment was affirmed by the Privy Council on identical grounds.

Counsel therefore suggested that the appropriate remedies for the plaintiffs were these:

Since the plaintiffs are occupying the plot concerned and this comprises only a portion of the land, the extent of their equity is a lease for 30 years commencing in 1972 when the representation was made by the visiting trustee of Khoo Kongsi. Accordingly, an injunction should be granted to restrain the defendants from trespassing on the plot concerned.

Alternatively, if the Court is of the view that D3's counterclaim for possession should be allowed and that the plaintiffs must yield vacant possession of the plot concerned to D3, then this should be made subject to the payment of compensation to the plaintiffs on the basis of their entitlement to a 30 year lease. This award being quite separate and apart from what may be awarded to the plaintiffs for damages for trespass and nuisance.

On the other hand, Counsel for the defendants contended that if contrary to his primary submission, the Court holds that D3 is bound to satisfy the plaintiffs' alleged equity, then having regard to the facts, the plaintiffs were not entitled to make any claim because the Court would have to take into consideration the length of the plaintiffs occupation of the plot concerned, the rate of rental; the period in respect of which rents were not collected; no rents having been collected since the expiry of the notice to quit dated 30 June 1982 in respect of the two dwelling houses and since 20 July 1982 in respect of the vegetable land and, finally, the fact that the entire families of the plaintiffs and their ancestors have been living on the plot concerned for decades.

On the question of the quantum of compensation to be awarded, my attention was directed by Counsel to the following passage in the judgment of the Federal Court in *Kalimuthu v. Kandiah* [1976] 2 MLJ 217, 221-222 which he considered most apposite:

> Assuming that the defendant is entitled to compensation, what should be the amount of such compensation? The defendant stated in evidence that on moving into the house he had it renovated and did minor repairs to it which cost him RM6,000. He produced no other evidence to support this assertion. The plaintiff's evidence was that when she first saw the house it had zinc roof and plank walls and that apart form minor repairs the structure remained the same. The defendant has lived in the house since 1962. Since 1965, that is for more than 11 years now, he has not paid any ground rent or assessment. This works out to a total of more than RM3,500. I do not think the house itself together with minor repairs would have cost the defendant or his father anything more than that. I believe the ends of justice will be met if he is not required to pay arrears of ground rent and assesment and not awarded any compensation, but I think he must be given a bit of time to give up vacant possession.

Counsel pointed out that the plaintiff had not adduced any evidence or, for that mater, even alleged what the cost of construction of the two dwelling houses was when they were erected. He suggested that the relevant date for assessing damages under this head would be not the present date but the date of construction. He added that if the present date were adopted as the relevant date for the assessment of damages, then there was an acute conflict of evidence as to the value of the dwelling houses and, furthermore, there was no evidence that the plaintiffs could not reuse the materials after the dwelling houses are dismantled.

In my view, generally speaking, a solution which says that the person making the expenditure or the improvement on another' s land is to have everything or nothing may rightly be described neither right nor fair and would also be clumsy and unsuitable. The correct approach should therefore be to protect that person against interference for long as he would be prejudiced thereby. The reports contain many examples where such an approach was adopted and I need no more than refer to a few.

In *Inwards v. Baker, (supra)*, for instance, the son was protected in his occupation and could remain in the bungalow "as long as he desired to use it as his home", despite the legal title being in the plaintiffs. In *Ward v. Kirkland* [1967] Ch 194, Ungoed - Thomas J granted an injunction to restrain interference with the exercise of a right of way in preference to granting an easement and in *ER Ives Investment Ltd. v. High (supra)* a right of way exercised in circumstances giving rise to an estoppel, was

held not to be an easement at law or in equity but enforceable, without registration, against a purchaser with notice.

In the present case, having regard to its history, not forgetting the acrimony generated by the dispute and which still persists in plenty I do not consider that the negative protection illustrated by the cases cited in the preceding paragraph would be appropriate; a final solution of the parties' rights according to the justice of the case would be needed.

More particularly, having regard to the fact that the plaintiffs and their ancestors have been living on the plot concerned and cultivating the vegetable land for the planting of vegetables and fruit trees on which they had also reared pigs and poultry for commercial purposes and the substantial sums of money which must have accrued to them and their ancestors by way of profit thereby over a period of several decades, and the further fact that the plaintiffs have enjoyed rent - free occupation for the last decade or so, I consider that the plaintiffs have had "sufficient satisfaction" for their labour and expenditure on the plot concerned or, in other words, the prejudice suffered by them has been fully satisfied, and so, they are entitled to no relief. [See *Att-Gen v. Balliol College, Oxford (ibid)* per Lord Hardwicke].

This means that **if,** but only if, I am wrong in my conclusion regarding issue 2, which it will be recalled raised the question: "What notice to quit was necessary to determine the plaintiffs' tenancies of the farm and the dwelling houses, assuming such tenancies were not coupled with an equity?", so that the notices to quit, each of one month's duration, given by the Solicitors of Khoo Kongsi, were contrary to my primary view, sufficient to determine the tenancies of the two dwelling houses, and the farm, then the plaintiffs and all those claiming possession or in occupation under or through them must quit, vacate and yield vacant possession of the plot concerned, dwelling house 259H and the farm (but not dwelling house 258R which I have held is subject to the Control of Rent Act 1966 ), to D3 without the payment of any compensation by D3 and I consider that a reasonable period for them to do so would be three months and I so order.

For the avoidance of doubt, I hasten to add that the question of the plaintiffs' entitlement to compensatory and exemplary damages for trespass are separate issues which are dealt with later in this judgment.

However, D3 is not entitled to claim any damages whether general or special from the plaintiffs in respect of their occupation of the plot concerned because their occupation having been protected by an equity or equitable estoppel they can in no way be regarded trespassers. Moreover, D3's claims for liquidated damages for late delivery of houses sold to third parties and for increased costs were all losses, which were self-induced. It follows, that prayer (b) and (c) of D3's counterclaim are dismissed.

Again, for the avoidance of doubt, I hasten to add, that in the event of there being no appeal to the Supreme Court from my judgment then this part of my judgment all of which relates to issue 3 and concerns the questions of equity or equitable estoppel, the extent of the equity and how it should be satisfied, concluding with the possession order made against the plaintiffs in favour of D3 (except for dwelling house 258K which I have held is subject to the Control of Rent Act 1966), is really an alternative judgment: and will not arise for consideration and, indeed, must be disregarded altogether, having regard to my conclusion on issue 2 which relates to the question of the sufficiency of the notice to quit, which I had determined in favour of the plaintiffs.

It follows that this part of my judgment which relates to issue 3, will only operate and require consideration in the event of an appeal to the Supreme Court by the defendants, and I am found to be wrong regarding issue 2 and, in so far as dwelling house 258K is concerned, I am also wrong that it is subject to the Control of Rent Act 1966.

**Issue 4 - Trespass and Nuisance**

I have already decided the issue herein as to the area of the plot concerned, being issue 1, in favour of the plaintiffs. Similarly, I have already found in favour of the plaintiffs as regards the *locus standi* objections; namely, the title of the plaintiffs to maintain the present suit including the claim for damages for alleged trespass arising out of the acts of D1 and D2 on 18 June 1982 and D3 and D4 on 17 March 1988.

**Did PW1 consent to D1 taking possesion of area etched black in P14 and levelling in consideration of the payment of RM1,000?**

I must next consider the question whether Cheng Lye Hiang (PW1) had agreed to accept RM1,000 to allow D1 to take possession and

level the area etched black in P14 whereon were vegetable beds planted by the plaintiffs.

It was the case for the defendants that PW1 had in fact so agreed. The only witness called by the defendants in this regard was the testimony of the Development Officer of D1 and D3 Goh Huay Guan (DW1). He testified that he had, on 18 June 1988, negotiated with Cheng Lye Hiang (PW1) who, it will be recalled, is the sister-in-law of P1 and P2, and that as a result, PW1 had agreed to accept RM1,000 to allow D1 to take possession and level the area etched black in P14. There was also an affidavit by the predecessor of DW1 a certain Chern Eng Hock (not called-at the trial) generally alleging such a settlement.

At this point, I might as well interpose to make my finding regarding the accuracy of P14 which purports to show the extent of the damage caused by the alleged trespass by D3 and D4 on 17 March 1988.

It was contended by Counsel for the defendants that P14 was virtually worthless as evidence as its author Lim Yee Juan (PW2) a research officer of the Consumer's Association of Penang, had been to the site only once and that was on the date of the alleged second trespass, to wit, 17 March 1988, that P14 was prepared by him based on information provided by PW1 whose source of knowledge was itself questionable.

I regret I find this attack on the reliability of P14 unacceptable. I accept the testimony of PW1 as to the circumstances under which he prepared P14 and that it reflects what he saw at the vegetable land on the morning of 17 March 1988 when bulldozers of D3 and D4 were engaged in levelling work thereon. In other words, I believe him when he says that he saw the demolition of some structures and the levelling of the plaintiffs' vegetable land and that he had taken photographs of these events. It was but natural for him to be assisted by PW1 who was on the site at the time in the preparation of a rough sketch of the structures and the vegetable land.

It follows, therefore, and I so find - that P14 accurately reflects the extent of the damage caused by the bulldozers of D3 and D4 on 18 March 1988.

I must now return to consider the question whether, in fact, PW1 had agreed to accept RM1,000 to allow D1 to take possession and level the area etched black in P14, as alleged by the Development Officer of D1 Goh Huay Guan (DW1) and his predecessor Chern Eng Hock in his affidavit.

Counsel for the plaintiffs has painstakingly set forth particulars of the inherent improbabilities and infirmities in the testimony of DW1, as well as the inconsistencies which appear upon a comparison being made between the testimony of this witness and the affidavit of Chern Eng Hock at pp. 62 and 63 of his written submissions. I have given careful consideration to these criticisms not forgetting what had been alleged by counsel for the defendants in this regard.

It would be tedious and unnecessary for me to recapitulate these rival contentions and I need no more than say that I would uphold the contentions of Counsel for the plaintiffs and adopt, as my own, his reasons therefor.

I therefore find as a fact that PW1 never agreed to accept RM1,000 or any other sum, as consideration for allowing D1 to take possession and level the area etched black in P14 whereon were the vegetable beds planted by the plaintiffs and so I find that the testimony of the Development Officer, Goh Huay Guan (DW1) and the affidavit of Cheng Lye Hiang on this point are unacceptable.

**Did D3 and/or D4 by their servants or agents cause the damage on plaintiff's vegetable land on 21 August 1988?**

I must next consider Goh Huay Guan's denial that on 21 August 1988 neither D3 nor D4 had levelled the plaintiffs' vegetable land or destroyed the plaintiffs' vegetable beds thereon and his claim that D3 and D4 had instead been working on one Khoo Bak Chun's land on that day.

Counsel for the plaintiffs has castigated this part of Goh Huay Guan's testimony as a blatant lie for reasons he has set forth at paras 1 and 2, p. 65 of his written submission.

After considering these criticisms levelled against Goh Huay Guan's testimony, again not forgetting the submissions of Counsel for the defendants, I agree with Counsel for the plaintiffs that the testimony of this witness has left too many questions unanswered (enumerated at para 2, p. 65 of plaintiffs' written submission) and the answers to the questions are supplied by the comment that most probably, DW3's

testimony here is really an afterthought to justify violation of the interlocutory injunction granted by this Court in favour of the plaintiffs to preserve the *status quo* pending the final determination of this suit, and I so find.

I therefore have no hesitation in finding as a fact that it was the servants or agents of D3 and D4 who on 21 August 1988, had levelled the plaintiffs' vegetable land and destroyed their vegetable beds thereon.

**The conflicting photographic evidence**

My attention was also drawn to the conflicting photographic evidence adduced by both sides which I should like now to touch on briefly.

According to the testimony of the development officer of D1 and D3 Goh Huay Guan (DW1), as at 18 June 1982 there were only five beds with vegetables growing on the plaintiffs' vegetable land and he produced the photograph D22 in support. But, D22 evidently shows only a portion of the plaintiffs' farm and so is misleading.

On the other hand, the photographs produced by the plaintiffs, namely, DB(P), 2(a), 2(b), 2(c), 3(a), 3(b), 3(c) which I find as a fact were taken by the sister-in-law of P1 and P2 Cheng Lye Hiang (PW1) and do show the whole of the vegetable lands on the plaintiffs' farm just before the trepass on 18 June 1982, present a very different aspect. I was reminded by Counsel for the plaintiffs that these photographs had in fact been exhibited to the affidavit of P1 and P2 filed on 21 June 1982 during interlocutory proceed ings and yet neither D1 nor D2 had at that time disputed their authenticity or accuracy nor did they then produce D22 by way of contradiction. These are considerations which by themselves certainly give rise to a supicion regarding the testimony of DW1 and went further to undermine his credibility. That suspicion has been confirmed at the end of the day when I had to assess his credibility and reliability.

Looking back, so far as this part of the case is concerned, I am amply satisfied that the plaintiffs have proved on the balance of probability that

(1) At all material time to this suit, the plaintiffs were and are in lawful possession of the plot concerned being the portion etched yellow in Ex P16 and having an area of approximately 121,000 sq. ft. (or 2.8 acres) and including the farm, the two dwelling houses and the structures erected thereon.

(2) On 18 June 1982, both D1 and D2 had by their servants or agents committed acts of trespass and nuisance, on the portion of the plot concerned being the area etched black in Ex P14.

(3) On 17 March 1988, D3 and D4 had by their servants or agents committed acts of trespass and created a nuisance on the portion of the plot concerned, being the area etched orange in Ex P14 and have been in unlawful occupation of the portion of the plot concerned being the area etched black in P14.

(4) On 21 August 1988, both D3 and D4 had by their servants or agents committed further acts of trespass and nuisance on the plot concerned by levelling the plaintiffs' vegetable land and destroying the vegetable beds thereon.

**The quantum of compensatory damages**

Now, those being my findings of fact on the issue of liability and they are findings in favour of the plaintiffs in respect of both trespass and nuisance, I must now address the question of the quantum of damages.

The general rule as to the measure of damages, a rule equally applicable to tort as to contract, was defined by Lord Blackburn in *Livingstone v. Rawyards Coal Co.* [1980] 5 App Cas 25 at 39 in these terms:

> that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been if he had not sustained the wrong for which he is now getting his compensation or reparation.

In *Munnelly v. Calcom* [1978] IR 387 Henchy J. said at p. 399

> the particular measure of damages allowed should be objectively chosen by the court as being that of the particular case, to put the plaintiff fairly and reasonably in the position in which he was before the damage occurred, so far as pecuniary awards can do so.

Before I proceed to assess the quantum of damages I would remind myself of certain other well established principles which I should keep in the forefront of my mind in considering this part of the case.

Firstly, when a plaintiff claims damages from a defendant he has to show that the loss in respect of which he claims damages was caused by the defendant's wrong and also that the damages are not too remote to be recoverable.

Secondly, I would refer to what Lord Goddard said in *Bohham-Carter v. Hyde Park Hotel Ltd* [1984] 64 TLR 177 at 178:

> Plaintiffs must understand that if they bring actions for damages it for them to prove their damage; it is not enough to write down the particulars, and, so to speak, throw them at the head of the Court, saying: 'This is what I have lost; I ask you to give me these damages.' They have to prove it.

Thirdly, on the quality of evidence expected of a plaintiff, it is necessary to remember what Devlin J. (as he then was) said in *Biggin Co. v. Permanite* [1951] 1 KB 422 at 438, namely, that where precise evidence is obtainable the court naturally expects to have it, where it is not, the court must do the best it can. Nevertheless, it remains true to say that that generally difficulty of proof does not dispense with the necessity for proof. [See *Aerial Advertising Co. v. Batchelors Peas* [1938] 2 AER 788 at p. 796 per Atkinson J] The case of *Ashcroft v. Curtin* [1971] 1 WLR 1713 illustrates this point for there the plaintiff claiming for diminution of profits of his one-man business failed in his claim despite the evidence pointing to a decrease in the company's profitability due to the injury, the records relied on being too rudimentary and the accounts too unreliable to quantify the loss.

**Claim for compensatory damages arising from trespass on 18 June 1982**

I must now consider the plaintiffs' claims arising out of the trespass committed by D1 and D2 on 18 June 1982. The sister-in-law of P1 and P2 Cheng Lye Hiang (PW1) has testified on the loss suffered by the plaintiffs as a consequence of this trespass as follows:

| | |
|---|---|
| 1. Loss of vegetable and fruit trees | ... RM 4,900 |
| 2. Loss of water piping system and motor pump | ... RM 3,500 |
| 3. Loss of income for area etched black in Exhibit P14 at the rate of RM1,500 per month from July 1982 to February 1988 | ... RM102,000 |

As to item (1), Counsel for the defendants has submitted that "there is no evidence of the vegetable and fruit trees grown on the main vegetable plot."

But this submission overlooks the defendants own photographic evidence, being D26, which indicates a thriving farm. There is also the testimony of the sister-in-law of P1 and P2 Cheng Lye Hiang (PW1) on this point which I accept in preference to that of the development officer of D1 and D3 Goh Huay Guan (DW1) who testified that there were only a few rows of planted vegetables whilst the rest was empty. The impression made upon me by DW1 was that he was not a witness of truth.

In my view, so far as this branch of the plaintiffs' claims is concerned, the court should not expect precise evidence and it must do the best it can. I do not consider this claim in any way unreasonable or excessive and I therefore hold that the plaintiffs are clearly entitled to the sum of RM4,900 in respect of the loss of the vegetables and fruits trees caused by D1 and D2's trespass on 18 June 1982.

As to item (2), the plaintiffs have claimed RM3,500 for the loss of the **water piping system and motor pump.** It is true that no receipt was produced in support but the plaintiffs had no cause to keep a receipt of this sort. On the evidence, I do not consider this claim in any way excessive, and so I hold the plaintiffs are also clearly entitled to the sum of RM3,500.

As to item (3), being the plaintiffs' claim for **loss of income derived from the farm** in respect of the area etched black in P14 at the rate of RM1,500 p.m. from July 1982 to February 1988 amounting to RM102,000.

The evidence relied upon by the plaintiffs to prove this branch of their claims came from Cheng Lye Hiang (PW1) who, it was said, had been working on the farm since she was ten years of age. I accept that she was and I also accept that by reason thereof it could be reasonably presumed that she was familiar with the farming practices and the prices of vegetables, pigs, chicken and the fruits concerned.

She testified under cross examination that her estimate of the loss of income was based on rate provided by the Thean Teik Residents' Assocation.

It was contended by Counsel for the plaintiffs' that her testimony was supported by that of an Agronomist attached to the University Science Malaysia, Dr. Kam Suan Peng (PW3) who was

called as an expert witness to prove the extent of the loss of their income.

There can be no room for a shadow of doubt that PW3 was an Agronomist of high repute and integrity. I accept that her whole purpose in testifying was to assist the court in doing justice in this case.

But, having said that it is necessary to probe the basis of her conclusions regarding the plaintiffs' claim for loss of income from the farm.

It was clear that Dr. Kam's testimony was based upon data obtained from her own study of 12 farms in Thean Teik Estate, not including the plaintiffs' farm, but similar to it. She had also considered a study of Thean Teik farms made by the Penang Development Corporation and found that the results of her own study corresponded with those of the Penang Development Corporation study which she admitted was more comprehensive than her own.

Having said that, it must be recognised that in making their claims for damages for loss of income the plaintiffs were making three assumptions or impliedly relying on three propositions; namely:

(a) that they had a market for the fruits and vegetables concerned;
(b) that this market had been properly proved; and
(c) that this market value of the fruits and vegetables concerned was the proper basis for an award of damages under this head.

In my view, propositions or assumptions (a) and (b) were mistaken because they were never proved.

The normal way of method of proving market value in the case of a resale of goods in bulk would be to call the customers or at the least, where the parties agree to documentary evidence to tender documents showing the existence of and a dealing with customers. In the case of a (say wholesale) distribution to several customers, a plaintiff would be expected to adduce in evidence books or documents showing that he had a business in the course of which he might reasonably have distributed these goods and the price he would have obtained. The plaintiffs in this case did none of these things; they produced no business books or accounts or documents showing the existence of and a dealing with customers. Nor, for that matter, did they produce any income tax returns but I do not place undue stress on this point because persons in the position of the plaintiffs may prefer not to do so even though their earnings may attract income tax.

In other words, what I am saying is that a plaintiffs' unsupported assertion that he would receive such and such a price for his fruits or vegetables does not prove market value much less that he had a market. It must be proved aliunde - that is to say, in order to prove that a plaintiff would have got such and such a price for the fruits or vegetables, the natural thing to do would be to call the man who would have paid the price.

To say that it would be sufficient for a plaintiff to prove market value and that he had a market by merely just saying that "I could have sold my fruits and vegetables at such and such a price", would, at least in a case where a substantial claim is being made, as in the present case, dispense with proof of quantum altogether.

That being so, I do not consider that the expert testimony of Dr. Kam can redeem the weakness in the proof offered by the plaintiffs of the alleged loss of income, since her testimony, which is really theoretical, cannot serve as a substitute for the proof required to establish that there was a market for the fruits and vegetables and that the plaintiffs had a market along the lines I have indicated.

It follows, therefore, that while I am satisfied that the plaintiffs have demonstrated the fact of damages in regard to their claim for loss of income, I do **not** consider that they have adduced sufficient evidence as to its amount.

That, however, does conclude the issue, because the defendants had themselves adduced evidence of the results of a socioeconomic survey conducted by the District Office of the North East District, Penang, on behalf of the Tri-Partite Committee, whose members were representatives of the State Government of Penang, the Developers and the Thean Teik Estate Residents' Association, contained in the report Ex **D53,** which Counsel for the defendants himself urged could not be ignored as it came from an independent source (see para 23. 7 p. 50 of his written submission). I would treat this as an **admission** on the part of the defendants' that the plaintiffs' monthly family income from

the farm at all material times to this suit is correctly reflected therein and was as follows:

P1 RM450 p.m.
P2 RM450 p.m
PW1 RM420 p.m

PW1's Children: Cheng Choon Leng RM280 p.m.
Cheng Choo Hok RM430 p.m.

In the absence of sufficient evidence adduced by the plaintiffs as to the extent of the loss of their income by reason of what the defendants did, I consider that I am entitled to rely on D53, put in by the defendants, which Counsel for the defendants had urged could not be ignored, and which I would treat as a document, the contents of which are admitted by the defendants at least impliedly if not expressly.

I do not consider that the plaintiffs are entitled to sue for the recovery of loss of income suffered by PW1 or her children. Nor, for that matter, would PW1 or her children be entitled to any such award as they are not parties to this suit. The plaintiffs' claims so far as this part of the case is concerned must be confined to loss of income suffered by P1 and P2 only, they being the surviving plaintiffs.

Accordingly, I would award in favour of P1 and P2 and against D1 and D2, in respect of loss of income for area etched black in P14, for the period from July 1982 to February 1988: at the rate of RM900 p.m., the sum of RM60,300 to be apportioned between P1 and P2 having regard to their respective incomes aforesaid.

**Claims for compensatory damages arising from trespass on 17 March 1988**

I next turn to consider the plaintiffs' claims arising out of the trespass committed by D3 and D4, by their servants or agents on 17 March 1988.

PW1 had also testified on the loss suffered as a consequence of this trespass as follows:

1. Loss of vegetables ... RM 3,000.00
2. Loss of fruit trees ... RM 18,000.00
3. Loss of pig sties, chicken coops, well, utensils and structures ... RM 40,050.00
4. Loss of sprinkler system ... RM 12,000.00
5. Loss of farm income at the rate of RM5,100 per month from April 1988 and still continuing (44 x RM5,100) RM224,400.00

As to item (1), being the claim **for loss of vegetables** amounting to RM3,000, the Court, should not, I think, expect precise evidence and it must do the best it can. I do not consider this claim in any way unreasonable or excessive and I therefore hold that the plaintiffs are clearly entitled to this sum of RM3,000.

As to item (2), being the claim for **loss of fruit trees** amounting to RM18,000, for the same reasons I have given for allowing the claim in respect of item (1), I would also hold that the plaintiffs are clearly entitled to this sum of **RM18,000.**

As to item (3), being the claim for **loss of pig sties, chicken coops, well, utensils and structures,** amounting to RM40,050, here again I do not think the Court should expect precise evidence and it must therefore do the best it can.

It was contended by Counsel for the defendants that the chicken coops, pig sties, and the other structures were in a ruinous state and should not therefore be compensated. In support of the contention that the structures were in a ruinous state my attention was directed to certain photographs taken in 1990 by representatives of the defendants (see DAB p/6 photos at pp. 7A, 7B and 15A; AB2 pp. 96N and 96-0 D25A, D25C and D25D, which depict abandoned pig sties and DAB photos at pp. 8A, 8B and AB2 pp. 95 L. 96 M and 96-0 which depict three dilapidated and abandoned chicken coops).

On the other hand, it was contended by Counsel for the plaintiffs that the plaintiffs had discontinued their livestock rearing sometime in 1985 as a direct consequence of the defendants' acts of trespass, and so, it was but natural for the structures concerned to have become dilapidated due to disuse. With this submission I agree.

It is necessary to examine the conflicting evidence adduced by the parties regarding this particular claim.

For the plaintiffs there was the testimony of PW1 as to the value of the items concerned - meaning their present value. Her testimony on this point was, to some extent, supported by the testimony of a contractor cum carpenter Song Ah Bah (PW4).

It was pointed out by Counsel for the plaintiffs that this witness had as much as 30 years experience in the construction field, in particular, in building houses, chicken coops, pig sties,

that he had visited the plaintiffs' farm and had personal knowledge of the structures and building thereon. His estimates were based on what he considered were current costs of material and labour.

Song Ah Bah had estimated the current cost of construction of the three chicken coops to be RM12 p.s.f. PW1 had testified that one of the chicken coops was 8 ft x 16 ft, so the cost of reconstruction of this one at that rate would be **RM1,536** whilst the other two were, she said each 8 ft x 12 ft, so that the cost of reconstruction of these two would be RM2,304. So the aggregate cost of construction of these two chicken coops would be: **RM3,800.**

Song Ah Bah had also estimated the current cost of construction of the two pig sties at RM12 p.s.f. PW1 had testified that each pig stie was 25ft x 75 ft. So, at this rate, the aggregate cost of construction of these two pig sties would be **RM22,500.**

Song Ah Bah had further estimated the current cost of construction of the storehouse shown in photographs 6(a) in DAB, with a cement floor, zinc walls and zinc roof at RM10 p.s.f. whilst the cost of construction of the other storehouse shown in potograph 6 (b) in DAB with the asbestos roof but with no walls and just an earth floor would be RM7 p.s.f.

PW1 had testified that the first mentioned storehouse was 12 ft x 8 ft, so that the cost of construction at that rate would be RM960, (10 x 12 x 8) whilst the other storehouse was, she said, 15 ft x 24 ft, so that the cost of construction of this one would be **RM2,520** (7 x 15 x 24)

For the defendants, there was the testimony of a Chartered Quantity Surveyor Saw Soon Kooi (DW5) who gave his own opinion as to the replacement costs of the structures and buildings concerned. He tendered his report Ex. D54 (paras 4.3 and 4.4 and 4.5) which said this:

> 4.3 I was shown photographs of a pigsty, identified by the defendants' solicitors to me as DAB photos pp. 7A, 7B and 15A; AB2 pp. 96N and 96-0 and D25A, D25C and D25D. These photographs depict an abandoned pigsty. In my professional opinion the cost of building a new pigsty shown in these photagraphs with its floor, troughs and partitions being made of concrete and the roof made of asbestos sheet would cost about **RM6.50 per sq. ft.**
>
> 4.4 I was shown photographs, identified by the defendants' solicitors as DAB photos pp. 8B, and AB2 p. 95K which depict, what appear to be, a **storehouse.** In my professional opinion the cost of erecting a similar storehouse with an earthen floor would be **RM5.00 per sq.ft.**
>
> 4.5 I was shown photographs, identified by the defendants' solicitors as DAB photos pp. 8A, 8B and AB2 pp. 95L, 96M and 96-0, which depict **three dilapidated and abandoned chicken coops.** In my professional opinion the cost of building a similar chicken coop would not exceed **RM4.50 per sq. ft.**

I must now choose between the conflicting expert opinion evidence adduced by the parties regarding this part of the case.

It is true that in terms of qualifications, there is obviously no comparison to be made between Song Ah Bah and Saw Soon Kooi. The former is a small time contractor cum carpenter in the position of a mere petty trader who has made no special study of the subject he was testifying about, whilst the latter is a Quantity Surveyor, and therefore in the position of a professional man. But, must I, on account of that alone, look askance, at the testimony of Song Ah Bah. I think not.

It must be recognised that the valuations being made here by these two witnessess concern the replacement costs of chicken coops, pig sties, and store houses. In this field, Song Ah Bah claimed, without challenge, that he had some 30 years experience whilst Saw Soon Kooi made no claim to having any experience relevant thereto. With respect, it does appear to me, therefore, that there is substance in Counsel for the plaintiffs' criticism of Saw Soon Kooi's opinion as being impressionistic.

Having seen them both testify, I prefer the testimony of Song Ah Bah to that of Saw Soon Kooi regarding this part of the case. However, I am not prepared to go all the way and accept the testimony of Song Ah Bah *in toto*, as I think, that some allowance must be made for errors in estimated costs which estimates were, after all, only rough estimates. I would therefore reduce his estimated costs by 1/3 allow for contingencies.

As to item ( 3), therefore, I would hold that the plaintiffs are clearly entitled to the sum of

**RM26,700** (RM40,050 x 2/3) and I award that sum accordingly.

As to item (4), being the claim for the **loss of the sprinkler system** amounting to RM12,000, this was based on the unsupported testimony of PW1 who claimed that her sprinkler was imported from Italy. The person who installed the sprinkler system was not called to testify.

Counsel for the defendants quite correctly drew my attention to the fact that under cross examination PW1 had admitted that it was P2 who paid for the installation of the sprinkler system but P2 had earlier testified that she did not know anything about this.

I do not, therefore, consider that the plaintiffs' claim under this head has been properly substantiated. In my view, on the evidence, I do not think that the plaintiffs would be entitled to any sum in excess of RM6,000 as replacement costs of the sprinkler system, and I award that sum accordingly.

As to item (5) being the plaintiffs' **claim for loss of farm income** (including loss of income for the area etched black in P14 at the rate of RM5,100 p.m**. from April 1988 and still continuing,** amounted to RM224,400 (RM5,100 x 44), my observations regarding the infirmities in the plaintiffs' claim for loss of income arising out of the trespass committed by D1 and D2 on 18 June 1982, would apply equally to it but *mutatis mutandis.*

Similarly, my observations regarding the value and worth of Ex D 53, being the report containing the results of the Socio-Economic Survey conducted by the District Office of the North East District, Penang, on behalf of the Tripartite Committee, whose members were representatives of the State Government of Penang, the Developers of Thean Teik estate, and the Thean Teik Estate Residents' Association, would also apply equally to this part of the plaintiffs' claims but, *mutatis mutandis.*

I also consider that the period of 44 months loss of income claimed in respect of past loss of farm income is a fair period, to adopt in assessing damages under this head.

Accordingly, I would award in favour of P1 and P2, and against D3 and D4, in respect of loss of farm income (including loss of income for the area etched black in P14) for the period of 44 months with effect from April 1988, that being the specific period claimed, at the rate of RM900 p.m., the sum of **RM39,600** to be apportioned between P1 and P2 having regard to their respective incomes aforesaid.

I have not overlooked the plaintiffs' claim for loss of future profits under this head. But, having carefully considered it, I do not consider that the plaintiffs' have substantiated it sufficiently, or at all. Upon the evidence, I do not consider that it has been proved that the plaintiffs would have continued their farming activities indefinitely had D3 and D4 not committed the act of trespass complained of.

**Claim for exemplary damages**

I next turn to consider the plaintiffs' claim for exemplary damages.

In a famous passage in his judgment in *Rooks v. Barnard* [1964] AC 1129 Lord Devlin, with the unanimous approval of all his brethren reviewed the law and laid down that exemplary damages could only be awarded in three categories of cases, namely, oppressive action by officers of the Crown; secondly, cases where "a defendant with a cynical disregard for a plaintiff's rights has calculated that the money to be made out of his wrongdoing will probably exceed the damages at risk", and thirdly, where statute expressly authorised it.

In addition Lord Devlin went further and spelt out three "considerations" applicable to all cases of exemplary damages:

> first, that the plaintiff cannot recover such damages unless he is himself the victim of such 'punishable behaviour'. Secondly, 'exemplary' damages can be used both for and against liberty, and are a punishment without the safeguard of the criminal law, so that the weapon must be used with restraint, and the house might have 'to place some arbitrary limit on such awards' despite the respect due to assessment of damages by juries. Thirdly, the financial means of the parties, though irrelevant to compensatory damages are relevant to exemplary damages.
>
> The fact that exemplary and compensatory damages must thus be presented differently to the jury, Lord Devlin also indicated, did not necessarily mean that the jury must make two separate awards. It should, however, be directed that exemplary damages should only come into play if it regards the amount which it has fixed for compensation as inadequate

in the circumstances to punish and deter the defendant and mark its disapproval for his conduct.

In *Cassel & Co. v. Broome* [1972] 1 AER 801 Lord Morris explained the ambit of the expression "calculated to make a profit" used by Lord Devlin in *Rookes v. Barnard*. This is how he put it at p.843:

> There may be exemplary damages if a defendant has formed and **be** guided by the view that, though he may have to pay some damages or compensation because of what he intends to do, yet he will in some way gain (for the category is not confined to money making in the strict sense) or may make money out of it, to an extent which he hopes and expects will be worth his while. I do not think that the word 'calculated' was used to denote some precise balancing process. The situation contemplated is where someone faces up to the possibility of having to pay damages for doing something which may be held to have been wrong but where nevertheless he deliberately carries out his plan because he thinks that it will work out satisfactorily for him.

The particular facts upon which Counsel for the plaintiffs relied as justifying an award of exemplary damages may conveniently be taken from his written submission were these:

1. In 1982, D1 and D3 required the portion etched black in P14 for their development but took no steps to obtain possession by lawful means. The tenancies had not been determined and the plaintiffs' equity satisfied. No legal proceedings were commenced to recover possession, although one month before the trespass P1 and P2 by their solicitors had warned D1 not to enter the portion. They took the law into their own hands and levelled the portion.
2. The earthwork carried by D1 and D3 was illegal since therewas no approved earthworks plan. (See evidence of DW4 under cross-examination). There was no approved plans then for the construction of the sewage treatment plan and the LLN Substation. The object of the exercise was to harass and intimidate the farmers including the plaintiffs into settling with D1 on D1's terms.
3. Instead of admitting, and being sorry, for their unlawful act, the defendants have fabricated the incredible story that PW1 consented to their levelling the said portion.
4. Because the plaintiffs instituted legal proceedings against D1 and D2, D1 induced Khoo Kongsi to issue notices purportedly terminating the tenancies.
5. In 1988, although there was a case pending in court in which the issue was whether the plaintiffs' possession of the portion of land occupied by their farm and houses were protected by equity and law, D3 and D4, with impunity and without any regard for the pending case and without waiting for a judical decision on the rights of the plaintiffs with regard to the said portion, entered the plaintiffs' farm by force and demolished the chicken coops, pig sties and structures and levelled the vegetable farm.
6. In breach of the injunction dated 7 April 1988, D3 and D4 have committed the following unlawful acts:
   (i) On 21 August 1988, they levelled a part of the vegetable farm subject to the injunction. The defendants disputed this and contended that on that day they were working on Khoo Bak Chun's farm. PW1 testified that the defendants were working on her farm. She produced photographs in support of her story. Why did the defendants not call Khoo Bak Chun to testify to their story. An adverse inference should be drawn against the defendants for failing to call Khoo Bak Chun.
   (ii) DW4 admitted that D3 and D4 constructed an LLN substation and sewage plant on the portion etched black in P14 after 7 April 1988, that is, the date of the injunction order.
   (iii) D3 and D4 have destroyed the drainage system of the farm and raised the ground level of the adjoining land causing the flooding of the farm.
   (iv) In breach of the injunction D3 and D4 have been extrating water from the pond in the farm.
   (v) D3 and D4 caused dangerous objects to drop on the roof of House No. 259-H during their building operations.

In summing up this part of his claim, Counsel for the plaintiffs said this:

> It is clear from the above that D3 and D4 were using harrassing tactics, including the destruction of the plaintiffs' source of livelihood, to recover possession of the portion of land in the plaintiffs' possession. They did not institute any legal proceedings against the plaintiffs to recover possession of the land. Although the plaintiffs commenced legal proceedings against D1 and D2 in 1982, D3 filed a counterclaim for possession only in 1990, that is eight years later. If there is to be any respect for the law, the court should show its unqualified disapproval of the defendants' arrogant display of power and influence and contemptuous disregard for the law by the award of exemplary damages.

The following comment by Lord Denning in *Drane v. Evangelou & Ors (ibid)* would equally apply to this case.

> As this case unfolded before us, the circumstances in which these young people were forced out of the house, the in-laws being pushed in, the landlord ... not complying with the injunction ... it did seem to be a case in which, in Lord Devlin's words, it was necessary 'to teach the landlord a lesson'.

In reply, Counsel for the defendants submitted that the plaintiffs were not entitled to examplary damages because:

(a) D1 and D3 were entitled to develop; the land under the agreements with the consent of Khoo Kongsi;
(b) The plaintiffs cannot claim to be fee simple owners of the lands and after the expiry of the notices to quit they were trespassers.
(c) D1 and D3 carried out the demolition works in the honest belief that they were entitled to do; D1 in the belief that it had the consent of PW 1 and D3 after the failure of the negotiations, and in the belief that it was entitled to following the decision of Mustapha Hussain J. dissolving the injunction and the decision of the Supreme Court in *Poh Swee Siang's* case that the remedy of self-help was available in this country.

It would be more convenient if I now considered the submissions of Counsel for the defendants.

As to (a), I do not consider that the fact that D1 and D3 were entitled to develop the land under the joint venture agreement with Khoo Kongsi, would also provide them with a license to act in disregard of the plaintiffs' rights in the plot concerned. I have already made my finding as to why I consider that the D1 and D3 had committed the acts of trespass concerned and so I need say nothing more about this point.

As to (b), I have already given my reasons for finding that after expiry of the notices to quit the plaintiffs continued to be in lawful occupation of the vegetable lands and the two dwelling houses, and I need say nothing more about this point.

As to (c), Counsel for the defendants has argued that the plaintiffs are not entitled to claim exemplary damages on three separate grounds; namely:

(1) that D1 and D3 were entitled under the joint venture agreement with the trustees of Khoo Kongsi to develop the lands there in described including the plot concerned;
(2) that upon expiry of the notices to quit, the plaintiffs continued in occupation of the vegetable land and the two dwelling houses Nos. 258K and 259H as trespassers and that having regard to the decision of Mustapha J dissolving the injunction hereinbefore mentioned, and the decision of the Supreme Court in *Poh Siew Siang's (ibid)* case, D1 and D3 were entitled to invoke the common law remedy of self-help by using reasonable force to eject the plaintiffs; and
(3) that in any event, D1 and D3 had carried out the demolition works with the consent of PW1

I regret I cannot accede to any of these submissions for they fail to take into account or give proper weight to the following facts:

In the present suit the primary issues were: What was the area of the land of which the plaintiffs were in possession? Whether their tenancy thereof and their tenancies of the two dwelling houses thereon, had been duly determined by the notices to quit served upon them, assuming the plaintiffs' occupation were not protected by an equity or equitable estoppel and, alternatively, if it were not so protected? In the case of dwelling house 258K, a further issue was: Whether the plaintiffs were entitled to invoke the protection of the Control of Rent Act 1966?

For the defendants', it was contended that the tenancies of the vegetable lands and the two dwelling houses were mere monthly tenancies, which, upon termination by notice to quit, rendered the plaintiffs' continued occupation thereof, unlawful and that they were therefore mere trespassers.

But with indecent haste, and without waiting for the determination of the issues aforesaid by the Court, D3 and D4, entered the plaintiffs' vegetable land by force of arms, levelling it and in the process, demolishing the chicken coops, pig sties, storehouses and other structures thereon.

Not content with these acts of wanton destruction, D3 and D4 went further and violated an injunction of this Court granted on 17 April 1988 in the following way:

(a) On 21 August 1988, they levelled a part of the plaintiffs' vegetable land and then

claimed that they were working not on the plot concerned but Khoo Bak Chun's land. However, Khoo Bak Chun was not called to testify and I hjave already found having regard to the testimony of PW1 - which I believe - supported by the photographs she produced, that D3 and D4 were, at the material time, indeed working on the plaintiffs' vegetable land.

(b) It was freely admitted by DW4 that D3 and D4 had constructed an LLN substation and sewage plant on the area etched black in P14 subsequent to the date of the injunction dated 7 April 1988.

(c) D3 and D4 had also, subsequent to the grant of the injunction, destroyed the drainage system on the plaintiffs' vegetable land and raised the ground level of the adjoining land, thereby causing the vegatable land to become flooded.

(d) D3 and D4 had also, subsequent to the grant of the injunction, extracted water from the pond situated in the plaintiffs' vegetable land.

(e) D3 and D4 had finally, in the course of their construction work on neighbouring land, caused objects to drop upon the roof of dwelling house 259H, causing damage, distress and anxiety to occupants.

I have already found upon the facts that there is no truth in the allegation that D3 and D4 had carried out the demolition works with the consent of the plaintiffs' sister-in-law Cheng Lye Hiang (PW1).

Trespass is normally associated with intentional acts even through committed by mistake; for mistake is no defence. [See *Basely v. Clarkson* 83 ER 565]. It follows, therefore, that the story of D1 and D3 that they carried out the demolition works concerned in the honest belief that they were entitled to do so (even if true, and this I cannot accept) is no defence. Their mistaken view of the law, in particular, the effect of the decision of Mustapha J. in dissolving the injunction and the decision of the Supreme Court in *Poh Siew Siang's* case as to the availability of self-help is therefore no defence to an action for trespass. It is also in my view, no answer to the claims for exemplary damages having regard to the particular circumstances of this case.

I would go further and find, on the facts, that the probabilities are that the defendants, who at all material times were represented by solicitors, must have known that their rights to develop the lands under the joint venture agreement entered into with the trustees of Khoo Kongsi could provide them with no defence to an action in trespass by occupiers threof in the event of their notices to quit being held in a court of law to be ineffective to terminate the tenancies of those occupiers. If therefore, the defendants chose to take the risk in case the issue of validity of the notices to quit should be answered against them, they have only themselves to blame.

Turning to the submissions of Counsel for the plaintiffs on the question of exemplary damages, I have recapitulated these submissions and it is my considered view that there is substance in them.

The evidence amply justifies the conclusions both of fact and law for which he is contending and I accordingly uphold them.

**Assessment of the quantum of exemplary damages**

The next question which requires consideration is what is the appropriate sum to award the plaintiffs by way of exemplary damages.

In *Rookes v Bernard*, Lord Devlin expressed the view that awards of exemplary damages should be moderate and that the resources of the parties was a relevant consideration. It follows from this that a modest award would make no impact on a defendant who is well-off, while conversely, even a modest award could work a great hardship on a defendant of modest means.

The other factor which must be taken into consideration is the quantum of the compensatory award (per Lord Devlin in *Rookes'* case at p. 1128) as well as the conduct of the parties right down to the time of the judgment. See *Praed v. Graham* [1889] 24 QBD 53.

In the circumstances, in so far as the claims arising from the trespass on 18 June 1982 are concerned, I would award in favour of the plaintiffs against D1 and D2 the sum of RM20,000 by way of exemplary damages, which would be little more than 25% of the compensatory damages amounting to RM68,700 I had awarded them in respect of the losses suffered by them arising from that trespass.

Turning to the claim for exemplary damages arising from the acts of trespass on 17 March 1988, committed by D3 and D4, it is self-evident

that these acts were considerably more serious than those attributable to D1 and D2, bearing in mind the damage caused which has been highlighted in the submissions of Counsel for the plaintiffs. Moreover, it must also be self-evident that D3's and D4's conduct has been more reprehensible than that of D1 and D2, bearing in mind the violations of the injunction granted by this Court. I am satisfied, for the reason stated, that these violations were deliberate and in utter disregard of the plaintiffs' rights and the authority of this Court.

It follows that any sum which this court awards by way of exemplary damages for these acts of trespass must reflect the gravity of that wrongdoing. In the circumstances, I would award in favour of the plaintiffs and against D3 and D4 the sum of RM40,000 by way of exemplary damages in respect of the acts of trespass committed on 17 March 1988 and on 21 August 1988.

I would add that in making the two awards of exemplary damages I have kept in the forefront of my mind the principles and the considerations enunciated by Lord Devlin in *Rookes v. Barnard*, to which I have referred.

I further award in favour of the plaintiffs interest at the rate of 6% p.a. on all compensatory damages awarded for the period from the date of service of the writ until the date of judgment under s. 11 of the Civil Law Act 1956, and thereafter, at the rate of 8% p.a. until satisfaction under 0. 42 r. 12 of the Rules of the High Court 1980.

Finally, I award in favour of the plaintiffs the costs of the action to be taxed by the Senior Assistant Registrar in default of agreement between the parties.

***Reported by Mohamed Aslam bin Mohamed Mydin***

**DATO LOW NAM HUI**

**v.**

**VU SIEW CHIN (F)**

HIGH COURT, JOHOR BAHRU
DATO' ALAUDDIN BIN DATO' MOHD. SHERIFF J.
[DIVORCE PETITION NO. 47-139-1986]
24 OCTOBER 1993

***FAMILY LAW: Respondent's application for ancillary relief - Petitioner's application to strike out - Whether respondent's application complied with the provisions of r. 56 of the Divorce and Matrimonial Proceedings Rules 1980 - Whether respondents application defective - Whether respondents application devoid of merits.***

The petitioner filed his petition for dissolution of his marriage in December 1986. The respondent did not file any answer to the petition or to the amended petition. The petitioner was granted a decree nisi on 12 January 1988 which was made absolute on 11 April 1988. The respondent and her Counsel was present at the hearing of the petition but did not make any application for ancillary relief under r. 56(1) of the Divorce and Matrimonial Proceedings Rules 1980 (the Rules).

In September 1992 the respondent made an application for ancillary relief and the petitioner applied to strike out the respondent's application on the grounds that the respondent had failed to obtain leave of Court under r. 56 of the Rules before making the application and the petitioner therefore contended that the respondent's application was defective. The petitioner further contended that the respondent's application was not made *bona fide* and was devoid of merits.

**Held:**

**[1]** Rule 56 of the Rules makes it mandatory that an application for ancillary relief must be made in the petition or answer. In the event that no such application is made either in the petition or answer then leave of Court is required under r. 56(2)(a) of the Rules. As the respondent had failed to obtain leave, the respondent's application was defective and was therefore not properly brought before the Court.

**[2]** In any event the responden's own substantial assets and financial resources are more than adequate to attend to all her reasonable needs. She has no justification or need for the